

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6056

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

MARILYN YOUNG, ET. AL.,

Plaintiffs-Appellants,

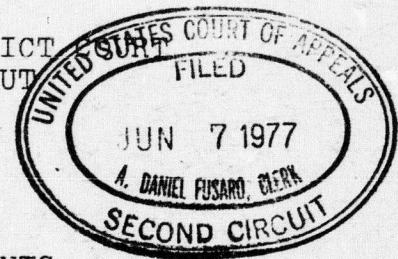
v.

BROCK ADAMS, ET. AL.,

Defendants-Appellees.

P/S

ON APPEAL FROM THE UNITED STATES DISTRICT
FOR THE DISTRICT OF CONNECTICUT



BRIEF FOR THE PLAINTIFFS-APPELLANTS

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BRIEF FOR THE APPELLANTS

PRELIMINARY STATEMENT

Appeal is taken from the January 10, 1977 judgment of the
Honorable T. Emmet Clarie, Chief Judge, United States District Court
for the District of Connecticut.

QUESTIONS PRESENTED

The questions presented to the court are:

1. Whether the District Court erred in granting defendants' Motion to Dismiss and/or for Summary Judgment when genuine issues of material fact were in dispute and the defendants were not entitled to judgment as a matter of law?
2. Whether the District Court erred in holding that 29 U.S.C. §794 and 49 U.S.C. §1612(a) were insufficient bases for relief?
3. Whether the District Court erred in holding that defendants had not violated plaintiffs rights to equal protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

On May 12, 1976, the plaintiffs, two handicapped residents of the State of Connecticut, brought this class action seeking to enjoin the State of Connecticut from purchasing the Connecticut Company and Orange Street Bus Line Company and purchasing 280 new buses, using federal Urban Mass Transportation funds, when the bus companies were, and the new buses the State intended to purchase would be, inaccessible to mobility handicapped persons.

The plaintiffs filed Motions for a Temporary Restraining Order and for a Preliminary Injunction and a Motion for Class Certification, and defendants filed Motions to Dismiss and/or for Summary Judgment.

A hearing on plaintiffs' Motion for a Temporary Restraining Order was held on May 24, 1976, and May 25, 1976 at which time, plaintiffs Motion for a Temporary Restraining Order was denied. The state defendants thus proceeded to purchase the bus companies with state and federally approved funds.

Hearings on plaintiffs' Motion for Preliminary Injunction concerning the states' planned purchase of 280 new inaccessible bus vehicles, were held on June 28, 1976, July 6, 1976 and on July 7, 1976.

On December 17, 1976, the court issued a ruling, granting the defendants' Motion to Dismiss, and/or for Summary Judgment, and on January 10, 1977, a judgment of dismissal was entered. Thereafter, on March 7, 1977, the plaintiffs filed a notice of appeal.

STATEMENT OF FACTS

1. The Role of the State of Connecticut in Public Transportation

The State of Connecticut is the major provider of public transportation in Connecticut today. Connecticut already provides commuter train services, and finances the operating deficit of the public bus system in the Hartford, Stamford and New Haven urbanized areas at an annual cost of 5.2 million dollars (T.97). Connecticut has also spent some 150 million dollars over the past few years to acquire capital assets for public transportation in Connecticut. Connecticut plans to further expand its involvement in public transportation in the near

future by acquiring and operating the now privately-owned bus companies operating in Bridgeport and New Britain (T. 223).

The Connecticut Department of Transportation hereinafter, (CDOT), operates only full size transit buses (exceeding 22 feet in length) in the Hartford, New Haven and Stamford urbanized areas. CDOT operates these buses along heavily populated fixed routes in metropolitan areas and on long-haul intercity commuter runs. CDOT already operates many commuter runs (T. 237) between such distant points as Middletown and Hartford and Marlborough and Hartford (T. 236) and has committed thirty six (36) buses out of the current order of two hundred and eighty (280) buses for expansion of existing service (T. 220). However, because all of these buses must be boarded through the use of steps, many persons with mobility limitations in the Hartford, New Haven and Stamford urbanized areas cannot use either the regular route service in metropolitan areas or the long-haul inter-city commuter service (T. pp. 76, 77, 140, 159, 207, 214). In addition, CDOT takes the position that separate "supplementary services" or non-fixed route services are not a state responsibility (T. 319, 404).

2. The Lack of Public Transportation for the Handicapped

a. In the Stamford Urbanized Area

There is no alternate public transportation for mobility handicapped individuals in the Stamford urbanized area (T. 82, 214). Further, no plans have been developed to provide transportation for the handicapped in the Stamford urbanized area

(T. 242, 306, 316).^{1/}

b. In the New Haven Urbanized Area

There is also no alternate public transportation for the mobility handicapped in the New Haven urbanized area (T. 207). The only accessible transportation available is prohibitively expensive (i.e. over \$15.00 per ride)(T. 207) or is available for emergency medical purposes only (T. 207). Whatever tentative transportation planning that has been accomplished in the New Haven urbanized area contains no provision for the handicapped (T. 235, 242, 248, 297).^{2/}

^{1/} CDOT has been designated as an entity that can apply for and receive federal funds in the Hartford, New Haven and Stamford urbanized areas. Although in the Hartford urbanized area, the Greater Hartford Transit District is also designated as an agency that may apply for federal funds (T. 336, 339, 340) its activity in this regard is limited because it has almost no power to raise funds (T. 363, 370, 392) The State of Connecticut is the only entity so designated in the New Haven and Stamford urbanized areas. Any section five recipient can develop plans and apply for federal transportation funds provided they have local matching funds available (T. 337, 338).

^{2/} At the hearing on the plaintiffs' preliminary injunction motion, CDOT suggested the possibility of setting up a ten van system operating on fixed routes in New Haven (T. 261-265). This settlement proposal was formulated by state planners about one week before the July 6, 1977 hearing (T. 262, 301). The proposal was not well thought out, as evidenced by the fact that it had not been committed to formal writing (T. 301) or discussed with handicapped individuals (T. 298) and no thought had been given to whether it would meet the transportation needs of the handicapped (T. 302). This ten van system was apparently only a proposal developed hurriedly because of pending litigation (T. 262, 312), and will not now be carried out as evidenced by the fact it was not included in subsequent Transportation Improvement Plans submitted to UMTA submitted which is an indispensable prerequisite to obtain federal funds (T. 296, 297) and no application for federal funds has been submitted for this purpose.

c. In the Hartford Urbanized Area

The situation in the Hartford urbanized area requires more explanation because the transportation planning process is further advanced. Upon close scrutiny, however, it becomes obvious that CDOT's efforts to plan or provide transportation services for the handicapped in the Hartford urbanized area are no more substantial than those discussed above in relation to the New Haven and Stamford urbanized areas.

The Transportation Development Plan for the Hartford urbanized area completed on August 25, 1975 and later approved by UMTA (Plaintiffs' Exhibit E) specified public takeover of mass transportation and establishment of a regionwide transportation system for the handicapped as top priority goals for improved transportation for the Hartford Urbanized Area. The first step in developing this regionwide system was to be the purchase of four wheelchair accessible vans in the cities of Hartford, West Hartford, and East Hartford before July 1, 1976 which was to be expanded as need was identified (T. 151, 152, 358). While public takeover of mass transportation has been effected, no concrete steps have been taken to institute the regionwide transportation system for the handicapped. When the time came to prepare plans for the transportation system for the handicapped, CDOT indicated that only \$28,500 in State funds would be left over for this purpose after the operating deficit of the public bus system was financed (T. 359). This amount of money appeared in the Transportation Improvement Plan (T.I.P.) as local match

money that would be available for transportation services for the handicapped in the Hartford Urbanized Area for the fiscal year 1975-1976 (See plaintiff's Exhibit F). In actuality, however, no state money was ever set aside for this purpose and the region-wide transportation system for the handicapped was never instituted (T. 149-151, 187, 188, 359).

The Transportation Improvement Plan for the Hartford urbanized area for FY1976-1977 was submitted for federal approval in late 1976. That document includes state funding of transportation projects in the capitol region of \$9,852,000 but no state money to meet the transportation needs of the mobility handicapped (T. 191, 285-287). The plan does call for the purchase of a certain number of wheelchair accessible vehicles by certain towns and non-profit agencies of the Hartford Urbanized Area but requires that the local match money come from local sources (T. 286, 287).

Since such funding is dependent upon the willingness of local towns to provide match money, there is no assurance that any program will be established (T. 288, 289, 327, 328). Further, these vehicles if purchased will not be committed to a regional transportation system for the handicapped (T. 349) but rather, as replacement vehicles for local transportation systems that serve primarily elderly individuals, are not available to most handicapped persons and are intended to meet only emergency needs (T. 349, 350, 384). Finally, towns demand control of the vehicles purchased and operated with their funds and wish to transport only within town boundaries (T. 349, 350, 385, 390).

3. The 16(b)(2) Program

The only undisputed evidence offered by the defendants at the preliminary injunction hearing respecting state efforts to meet the transportation needs of the handicapped in the Hartford, Stamford and New Haven urbanized areas, related to joint federal-state purchase of vans under the 16(b)(2) program (49 U.S.C. 1612(b)(2)). This program provides capital assistance only to private non-profit organizations to assist them in providing transportation to the handicapped. Eighty percent of the cost of these vehicles is paid by the federal government and twenty percent is paid by the state, (T. 82). The vans destined for the Hartford, New Haven and Stamford urbanized areas will be operated by the non-profit organizations, United Cerebral Palsy Association of Greater Hartford, Inc., Easter Seal, and Goodwill Industries, Inc. in New Haven and Stamford (Affidavit of Robert Patricelli dated May 19, 1976, para.11).

Because these organizations must pay the operating costs of these vehicles (T. 83, 130, 199) and because the transportation demands of their own clients will require commitment of all the operating time of these vehicles (T. 84, 85, 199, 214), the vehicles will not be available to meet the transportation needs of the general handicapped public (T. 83, 84, 85, 199).

4. The Needs of the Handicapped for Public Transportation

Mobility handicapped persons have the same transportation needs as the rest of the general public; that is, to get to work, to

shop, to go to school and reach places of entertainment (T. 7, 45, 76). Studies undertaken by the federal government and The Greater Hartford Transit District indicate that approximately 6400 individuals with mobility limitations need low-cost accessible mass transportation in the Hartford urbanized area (T. 356); that the majority of 11,000 handicapped persons in the Stamford urbanized areas need low cost accessible mass transportation (T. 215) and that about three percent of the population in the New Haven urbanized area need low cost accessible mass transportation (T. 63).

CDOT has been aware for some time that no public transportation exists for handicapped individuals in the Hartford urbanized area. A study completed in November of 1974 by CDOT concluded that no public transportation for the handicapped existed in the Hartford urbanized area (T. 140, Plaintiffs' Exhibit D, p. 25) and recommended a system be established considering a combination of accessible standard size vehicles operating on regular routes and a supplementary system of small vans. No such transportation system has been established (T. 141, 142). CDOT has also been aware for some time that its failure to plan and provide transportation services for the handicapped was contrary to federal law (Plaintiffs' Exhibit E, p. 4-43; T. 147).

5. Planning Requirements for Public Transportation for the Handicapped

Section 16a of the Urban Mass Transportation Act (49 U.S.C. §1612 (a)) mandates special efforts in the planning, design, construction and operation of mass transportation facilities and services so

that the availability of mass transportation which handicapped individuals can effectively utilize will be assured. UMTA has issued regulations mandating certain planning and transportation service requirements for any state or local body seeking federal operating (49 U.S.C.1604) or capital acquisition (49 U.S.C.1602) assistance. To become eligible for federal funds, state and local areas must develop an acceptable planning process, designate an entity or entities to receive federal funds and provide local matching funds.

UMTA regulations ^{3/} specify that responsibility for planning at the local level rests jointly with the Metropolitan Planning Organizations (MPO) designated by the Governor together with the State of Connecticut. ^{4/}

The MPO for the Hartford, New Haven and Stamford urbanized areas are the Capitol Regions Council of Governments (T. 307), the South Central Connecticut Regional Planning Agency (T. 125) and the South Western Connecticut Regional Planning Agency (T. 316) respectively. ^{5/} These agencies together with the State of Connecticut are charged with the responsibility of developing plans for transportation that handicapped individuals can effectively

^{3/} 23 C.F.R. Part 450, and 49 C.F.R. part 613 (effective October 17, 1975).

^{4/} 23 C.F.R. 450.104(b) and 49 C.F.R. 613.100, and see Defendants' Exhibit 2 entitled "Capital Grant Contract for Project No. CT-03-0016," p.1 of 6, placing special efforts responsibility squarely on CDOT.

^{5/} See Defendants' Exhibit 5; the designated MPO for the New Haven and Stamford urbanized areas is the TRI-State Regional Planning Commission, transportation planning responsibility for the New Haven and Stamford urbanized areas, however, has been delegated to the South Central Regional Planning Agency and the South Western Connecticut Regional Planning Agency respectively.

utilize ((23 C.F.R. 450.120(a)(5)).

Although UMTA's planning regulations contemplate cooperative decision making involving both state and local officials with substantial input from handicapped consumer and organizations that serve the handicapped,^{6/} there can be little doubt that CDOT controls the planning process because it controls nearly all non-federal public funds available for mass transportation in the three urbanized areas affected by this litigation^{7/} (T. p. 184). This is also true because local officials sitting on local planning agencies cannot force CDOT to put up the required match money in order to apply for federal funds to develop mass transportation for the handicapped (T. 194, 245, 353, 354) and because CDOT has virtually all of the planning expertise in Connecticut (T. 274, 316). Since CDOT provides the local match money in most instances it can veto any program by refusing to provide funds (T. 245). Despite its expertise in transportation planning and its responsibility to plan according to federal regulations, CDOT has undertaken no studies to determine the most cost-effective ways of providing mass transportation to the handicapped nor has it considered such studies undertaken in other parts of the country (T. 278, 302, 303).

^{6/} 41 Fed. Reg. pp. 18235, 18236 (April 30, 1976).

^{7/} Although the Greater Hartford Transit District is also a section five recipient in the Hartford urbanized area it has virtually no power to raise funds for mass transportation (T. 354, 355, 392) and accordingly, has little control over how the region's apportionment for section five funds is spent (T. 184).

6. The State of Connecticut's Intended Purchase of the Connecticut Company, Orange Street Bus Line and 280 New Buses

On or about January 12, 1976, CDOT submitted an application to UMTA for funds to acquire the then privately owned Connecticut Company, the major provider of regular route mass transportation service in the Hartford, New Haven and Stamford urbanized areas, the privately owned Orange Street Bus Line Co., Inc. in New Haven, Connecticut, and for replacement buses and related equipment under Section 3 of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1602) (Plaintiffs' Exhibit A).

CDOT acknowledges in Exhibit M of its application that the existing mass transportation public bus system in the Hartford, New Haven and Stamford urbanized areas has no vehicles that serve handicapped individuals. 8/ Exhibit M further states that routine replacement buses will contain "special provisions" for the handicapped "as directed by UMTA", including verticle stanchions, non-skid floors, improved interior lighting, low level entrances with step well lighting--none of which make the public bus system in the Hartford, New Haven and Stamford urbanized areas accessible to mobility handicapped persons.

The grant application recites facilities and services purportedly available to the handicapped (Exhibit M to Plaintiffs' Exhibit A, p. 1-3). In fact, none of the agencies so enumerated provide reliable, low cost, mass transportation for the handicapped (T. 77-83). Private operators provide some transportation to the handicapped but the service is expensive with a minimum fee of about \$15.00 a trip (T. 78).

The Administrator of the Urban Mass Transportation Administration (UMTA) has been delegated all of the Secretary of Transportation's

8/ Exhibit M to Plaintiffs' Exhibit A, p. 1.

.. powers and functions under the Urban Mass Transportation Act
.. (49 U.S.C. §1612(a)) and Section 504 of the Rehabilitation Act
of 1973 (29 U.S.C. Section 794).

.. On May 12, 1976, UMTA approved CDOT's application in the
amount of \$26,660,952 consisting of the purchase of two private
mass transportation companies, 280 new 49-53 passenger buses and
other related equipment. UMTA was fully aware when it approved
the application that no low-cost public transportation existed
for the handicapped in the Hartford, New Haven and Stamford
urbanized areas, for in his approval letter dated May 12, 1976,
Robert E. Patricelli, then Urban Mass Transportation Administrator
stated, "I am concerned about the lack of any present specific
commitment on the part of CDOT to provide to the elderly and the
physically handicapped in the Hartford, New Haven and Stamford
areas mass transportation services which they can effectively use."
(Plaintiffs' Exhibit A). Despite this expression of concern and
the special condition inserted in CDOT's grant contract, no evidence
has appeared that either CDOT intends to provide mass transporta-
tion or that UMTA will take further action to protect the interests
of handicapped individuals absent such action.

.. These proceedings were instituted on May 12, 1976, to enjoin
.. the further expenditure of federal funds on transportation facilities
and vehicles in the Hartford, New Haven and Stamford urbanized
areas that the handicapped cannot use until such time as defendants'

demonstrated to the satisfaction of the court that mass transportation facilities and services which can be effectively utilized by mobility handicapped individuals have been planned, designed and made available in a non-discriminatory manner.

7. The Availability of Accessible Buses for the Handicapped

At the hearing on Plaintiffs' Motion for Preliminary Injunction extensive testimony was elicited and other information was presented that standard size buses could be made wheelchair accessible if CDOT chose to draw its specifications demanding inclusion of a wheelchair lift device (T.17, 18, 19, 20, 47, 54); (T. 35 and Young v. Adams, memorandum opinion, footnote 9; letter from Bass Dyer dated May 12, 1976 and Photographs of lift devices)(T. 26). Standard size accessible buses could be purchased with wheelchair lift devices within the same time frame as inaccessible buses (T. 19, 47, 50, 51, 54). The present cost of these devices is five to eight thousand dollars for a bus which costs approximately seventy five thousand dollars (T. 19, 53) with the lift-device price to eventually go down to \$2,000 (T. 19, 20). Testimony was also elicited to the effect that standard size buses could be made accessible through a "retro-fitting" process (T. 12, 27, 226, 227) at a cost of \$6,000 to \$12,000 per bus (T. 13). There was also testimony by both sides that smaller van-type accessible vehicles are readily available (T. 267-270 and Defendants' Exhibit 4A-4H).

Further, UMTA Regulations located at 49 C.F.R. 609.15 et. seq. state for UMTA approved vehicle specifications after February 4, 1977 that

manufacturers must offer a wheelchair lift as an option that at the request of the state or locality may be included in their order for standard size buses.

.. Despite this, CDOT has prepared specifications for 280 new buses
.. that mobility handicapped individuals will not be able to use and have offered no meaningful alternative to inaccessible mass transportation. In addition, UMTA has recently approved these specifications with full knowledge that the buses will be inaccessible and that no alternative plans have been developed to meet the transportation needs of the physically handicapped.

SUMMARY OF ARGUMENT

The District Court held that Connecticut's decision to purchase and operate only mass transportation vehicles with physical barriers that exclude mobility handicapped individuals was reasonable in light of the technological, efficiency and cost considerations the court found existed and that, consequently, Connecticut's participation in certain transportation programs for handicapped individuals with, smaller vehicles constituted compliance with 49 U.S.C. §1612(a) and 29 U.S.C. §794. The plaintiffs contend that the defendants failed to establish that no genuine issue of material fact was raised as to whether defendants were making special efforts to plan and design mass transportation that mobility handicapped persons could effectively utilize and that summary judgment was therefore, inappropriate.
..
.. Adickes v. Kress & Co., 398 U.S. 144 (1970). Plaintiffs also argue that reasonable minds might disagree as to whether the defendants' purchase and operation of exclusively inaccessible mass transportation vehicles taken together with other circumstantial evidence presented constituted

.. knowing discrimination against handicapped individuals proscribed
by the Equal Protection Clause of the Fifth and Fourteenth Amendments
to the United States Constitution and 29 U.S.C. §794. The court
.. erred in resolving inferences dealing with questions of motive,
intent and subjective feelings and reactions against plaintiffs
prematurely on a summary judgment motion. Empire Electronics
Co. v. United States, 311 F.2d. 175, 179-180 (2nd Cir. 1962).
Finally, the plaintiffs argue that the novel statutory and consti-
tutional issues presented in the complex factual framework of this
case should not have been decided before a thorough development of
the record could be made, Askew v. Hargrave, 401 U.S. 476 (1971).

The District Court erred in holding that section 504 of the
Rehabilitation Act of 1973 is insufficient as a basis for relief.
Section 504 does give plaintiffs rights which they may seek to
protect via a private right of action. Lloyd v. The Regional
Transportation Authority, C.A. No. 75-C-1834 (N.D.Ill., March 16,
1976) rev'd 548 F. 2d 1277 (1977). In establishing that a violation
of section 504 has occurred, the plaintiffs need only show that the
defendants' actions by creating and attempting to perpetrate a public
transportation system that handicapped people can not use, have had
the "effect" of discriminating against them, Lau v. Nichols, 414
U.S. 563 (1974). However, even if the District Court was correct in rul-
.. ing that in order for plaintiffs to prove a violation of section 504,
.. they must show that the defendants have intentionally discriminated
against them plaintiffs believe that the facts established thus far
demonstrate that the defendants have followed a pattern of conduct
which has had the foreseeable consequences of making the public

transportation system inaccessible and thus have intentionally discriminated against the handicapped plaintiffs. Bartels v. Biernat 427 F. Supp. 226 (1977). Thus, the court erred in failing to order an equitable remedy that would require the defendants to take the necessary action to make the system effectively accessible. Lau v. Nichols, supra.

The District Court held that undefined minimal efforts to provide transportation to handicapped persons constituted compliance with 49 U.S.C. §1612(a) without regard to the nature or quality of such services. The plaintiffs contend that 49 U.S.C. §1612(a) requires defendants to provide mass transportation services to the mobility handicapped that is reasonable by comparison with mass transportation provided the ambulatory public, and that the court erred in holding that Connecticut's nominal effort satisfied the statutory requirement. Plaintiffs also contend that the record established at the hearings on plaintiffs' Motion for Preliminary Injunction does not support the court's conclusion that defendants' made special efforts to plan and design mass transportation in the Hartford, Stamford and New Haven urbanized areas that mobility handicapped individuals can effectively utilize as required by 49 U.S.C. § 1612(a).

The defendants have violated the plaintiffs' rights to Equal Protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitution in creating and attempting to perpetrate a public bus transportation system that is inaccessible to the mobility handicapped. Plaintiffs claim that in light of the history of discrimination and political powerlessness that handicapped

people have suffered, any actions by the state or federal government that imposes a special burden upon them as a class should be subject to intense scrutiny, and in this case found wanting.

ARGUMENT

1. Summary Judgment Should Not Have Entered for Defendants Because Genuine Issues as to Material Facts Existed
- a. Summary Judgment Should Be Granted Only in a Very Limited Set of Circumstances

The standards which must be applied to grant or deny a motion for summary judgment are set out in Rule 56(c) of the Federal Rules of Civil Procedure. Summary judgment shall enter where the pleadings, together with the affidavits on file, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The purpose of summary judgment "is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial".^{9/} The court cannot try issues of fact on a summary judgment motion; it can only determine whether there are issues to be tried.^{10/} Moreover, when summary judgment is granted, the court must resolve all ambiguities and draw all reasonable inferences favorable to the party against whom summary judgment is sought,^{11/} bearing in mind that the moving party has the burden of showing an absence of any material factual issues for trial.^{12/} If undisputed evidentiary facts disclose competing material inferences as to which reasonable

^{9/} Dressler v. M.V. Sandpiper, 331 F. 2d 130, 132 (2d Cir.1964).

^{10/} American Manufacturing Insurance Co., v. American Broadcasting-Paramount Theatres, Inc., 388 F. 2d 272, 279 (2d Cir. 1967).

^{11/} United States v. Diebold, 369 U.S. 654, 655 (1962).

^{12/} Adickes v. Kress & Co., 398 U.S. 144, 157 (1970).

minds might disagree, the motion must be denied.^{13/} This should especially be kept in mind when the inferences which the parties seek to have drawn deal with questions of motive, intent, and subjective feelings and reactions.^{14/} Summary judgment is also an inappropriate method of deciding cases involving complex issues of fact of unsettled questions of law,^{15/} or in cases involving important public issues or constitutional questions.^{16/}

b. Material Issues of Fact were in Dispute

The District Court found that given cost, efficiency and technological constraints, CDOT's decision to equip none of its standard size buses with wheelchair lifts was reasonable;^{17/} that CDOT was making a "good faith" effort to extend low cost mass transportation services to the handicapped in light of its participation in the 16(b)(2) program and other projects;^{18/} and that the law required no more considering the court's finding that CDOT does not affirmatively exclude the handicapped from mass transportation in the Hartford, New Haven and Stamford urbanized areas.^{19/} The plaintiffs respectfully contend that the facts underlying these conclusions of the court were not

^{13/} Lemelson v. Ideal Toy Corp., 408 F. 2d 860, (2d Cir. 1969).

^{14/} Empire Electronics Co. v. United States, 311 F. 2d 175, 179-180, (2d Cir. 1962).

^{15/} Elliott v. Elliott, 49 F.R.D. 283 (1970).

^{16/} Askew v. Hargrave, 401 U.S. 476 (1971).

^{17/} Young v. Coleman, No. H-76-201 Memorandum Opinion, pp.5, 11 (December 12, 1976) (Unpublished).

^{18/} Ibid, pp. 6,8.

^{19/} Id., p. 9

undisputed, that the court did not consider all of the material facts in rendering its decision and that this case requires further factual development since it involves complex factual circumstances and novel constitutional and statutory claims of great social importance.

1. The Availability of Lift Equipped Buses

The only evidence defendants offered to support the court's finding that technological considerations militated against equipping any standard size buses with wheelchair lifts was contained in the Affidavit of Robert Patricelli dated May 16, 1976, and in testimony of two of CDOT's witnesses.

The relevant paragraph of Robert Patricelli's affidavit provides:

That no manufacturer in the United States presently produces a standard-size diesel transit bus equipped to allow passengers confined to wheelchairs to board, ride, and alight with safety for themselves and other passengers, although all three major domestic manufacturers of transit buses are engaged in the design and development of such a bus...20/

Mr. Patricelli does not directly address the technology issue in his affidavit. Instead, by indirection, he creates the impression that the technology to manufacture wheelchair lift devices for standard size buses has not been developed and that consequently such devices are experimental.

The state defendant offered the testimony of Fred Thum and John Spaulding regarding the technological difficulties issue. Mr. Thum testified that CDOT had no knowledge of commercially available lift equipment for full sized buses (T. 127), but he readily admitted that he had done no investigation regarding currently available equipment

20/ Affidavit of Robert E. Patricelli dated May 16, 1976, pp. 3,4, (See also T. 26).

(T. 132). Mr. Spaulding's subsequent testimony to the effect that accessible standard size buses could not be purchased was not based on personal knowledge or on any information collected by CDOT preparatory to bid solicitation, (T. 224-228).

The plaintiffs offered evidence from four sources to show that technology was not a barrier to making standard size buses wheelchair accessible. The plaintiffs' expert witness, Dennis Cannon, testified that manufacturers would deliver wheelchair accessible buses in the same time frame as inaccessible buses and that there were not technological barriers to obtaining accessible mass transportation equipment (T. 19-22). This testimony is corroborated by the materials in footnote 9 of the Court's opinion by the testimony of Thomas O'Brien (T. 57, 58) and by a letter from the Flexible Company.^{21/} In addition, UMTA's own subsequent promulgation of 49 C.F.R. 609.15(b) makes the above-quoted passage from Mr. Patricelli's affidavit outdated and contradicts any inference that technological barriers to purchasing accessible buses exist. That regulation, passed nearly six months after Mr. Patricelli prepared his affidavit, mandates that wheelchair accessibility features be available for use on standard sized buses for which a procurement solicitation, such as Connecticut's, issues after February 15, 1977.^{22/} UMTA certainly would not mandate the

^{21/} Letter from Bass Dyer dated May 20, 1976, Exhibit D to plaintiffs' Brief in Support of their Motion for Preliminary Injunction.

^{22/} Chief Judge Clarie misconstrued the October revisions of the UMTA regulations found at 41 Fed. Reg., page 45842 (October 18, 1976). At page 4 of his opinion he apparently interprets the regulations to require accessibility equipment only after May 31, 1977. In fact, manufacturers must ensure that accessibility equipment is available for bid solicitations issued after February 15, 1977. See also 41 F.R. 45842 (October 18, 1976), 42 F.R. 9654 (February 16, 1977) and 42 F.R. 13818 (March 14, 1977).

availability of untested or unsafe equipment for mass transportation buses. Also, major manufacturers of buses also would not agree to provide accessible buses if equipment was as untried and unsafe as Mr. Patricelli implies.

The court's conclusion that available technology militated against making standard size buses accessible is further undercut by the retrofit alternative which defendants concede is available.^{23/} The only evidence defendants offered in this regard was testimony from John Spaulding (T. 226). Although Mr. Spaulding indicated that the retrofitting process is costly, he conceded the availability of technology to retrofit accessibility into standard sized buses. The plaintiffs also offered expert testimony to the effect that many companies specialize in attaching lift devices to existing buses (T. 12, 13).

The plaintiffs' thus contend that the court's finding that technological considerations militate against equipping standard size buses with lift devices is based on testimony that is disputed, and on inferences drawn from Mr. Patricelli's affidavit to which, particularly in light of UMTA's own authoritative pronouncement at 49 C.F.R 609.15(b), reasonable minds might differ. The defendants have not shown that there is no genuine issue as to whether technological consideration support CDOT's decisions to equip no standard size buses with wheelchair lifts.^{24/}

^{23/} "Retrofitting" involves equipping existing vehicles with lift devices rather than having them initially built with the lifts in them (T. 12).

^{24/} See United States v. Diebold, supra; Adickes v. Kress & Co., supra; and Lemelson v. Ideal Toy Corp., supra.

ii. The Efficiency of Lift Equipped Buses

The court's findings that standard size accessible buses could not be operated efficiently because the mobility handicapped would throw off bus schedules is directly controverted as to long haul commuter runs by defendants' own witness (T. 236, 237), and by several of plaintiffs' witnesses, who testified that accessible standard size buses could be efficiently operated on commuter runs or on other regular routes by making schedule adjustments. (T. 23, 24, 163). Defendants offered no studies in support of their inefficiency argument. In fact, the record shows that no such studies had either been undertaken or examined by CDOT (T. 127, 302, 303).

iii. The Cost of Lift Equipped Buses

The court's conclusion that making a certain number of standard size mass transportation vehicles accessible to all citizens regardless of their mobility limitations would be costly, ^{25/}is apparently based on the fact that accessible buses cost about \$5,000 more than inaccessible buses (T. 8). Amortized over the fifteen year life of standard size buses, however, the cost is only about three hundred dollars per bus per year before increased revenues from increased ridership are considered. In addition, testimony was offered to the effect that with larger purchase orders and as time passes, the cost will markedly decrease (T. 20). Further, no additional operating costs would be incurred. The retrofit alternative would appear somewhat more expensive (T. 13, 226, 227). But whether expenditures

^{25/} Memorandum Opinion, p. 5 and footnote 9.

of this magnitude are "costly" would appear to turn on how expensive alternative mass transportation systems for the handicapped are. Conclusions on relative costs are entirely speculative, however, since CDOT has undertaken no studies and offered no evidence respecting alternative, cost-efficient ways to extend mass transportation to the handicapped (T. 302, 303). CDOT has also failed to evaluate efficiency studies done in other parts of the country on this particular subject (T. 302). Considering the fact that the "dial-a-ride" alternative appears to be costly to operate and less efficient than accessible regular route service, (T. 11, 23, 24), and that CDOT has made no effort to consider cost efficient means of providing mass transportation to the handicapped, the court's finding was clearly in dispute.

Defendants failed to establish no genuine issue existed as to whether accessible standard-sized vehicles could be operated efficiently or cost-effectively. Summary judgment should not have issued where defendants had not established through uncontroverted evidence that other more efficient and cost-effective means existed for providing mass transportation for the handicapped.^{26/}

c. The Amount of Effort by CDOT to Provide Public Transportation for the Mobility Handicapped

The court's conclusion that CDOT is presently making a good faith effort to provide the mobility handicapped with mass transportation

^{26/} Adickes v. Kress & Co., supra.

is also disputed.^{27/} The basis of the court's decision is found in footnote 9 of the court's opinion.

The court first stated that:

...Connecticut has purchased 24 van-type vehicles, of which 17 are equipped with "lifts" for wheelchairs, which will be operated by private, non-profit agencies in the state. These vans will provide at least some transport for those in wheelchairs.

These vehicles were purchased pursuant to section 16(b)(2) of the Urban Mass Transportation Act.^{28/} Section 16(b) (1) allows UMTA to make grants to private non-profit corporations for the specific purpose of supplementing the transit services provided by publicly operated systems. Section 16(b)(2) further makes it clear that the primary responsibility for providing accessible transportation services rests with the state and localities, and that privately operated services were to be implemented only where the former are "unavailable, insufficient, or inappropriate."

The evidence presented to the court by defendants regarding these vans was included in paragraph 11 of Robert Patricelli's affidavit^{29/} and testimony of CDOT's witnesses (T. 130, 131, 132, 267-271). From these materials it is clear that the vehicles will be given to private non-profit agencies throughout the state. Only six vans were destined for use in the Hartford, New Haven and Stamford areas that are the subject of this litigation. They will go the United

^{27/} Memorandum Opinion, p.8.

^{28/} 49 U.S.C. §1612(b)(2).

Cerebral Palsy Association of Greater Hartford, Inc., (Hartford)
Easter Seal/Goodwill Industries Rehabilitation Center of New Haven,
(New Haven), and Easter Seal Rehabilitation Center of Southwestern
Connecticut (Stamford).

In response to these assertions, plaintiffs offered testimony
from the 16(b)(2) vehicle recipients themselves to the effect that:

The 16(b)(2) vans will replace worn out vehicles that are
currently being used to transport clients to and from the operating
agency's rehabilitation programs (T. 83, 199, 200);

The private non-profit organizations receiving the vehicles must
pay the operating costs of the vehicles (T. 83, 199);

The private non-profit agencies pay their drivers to operate
the vehicles during working hours and drivers will not be available
evenings or weekends (T. 199);

The 16(b)(2) vans will be used to transport agency clients to
and from the agency's own programs and will not provide transportation
for the handicapped public for non-agency related functions (T. 83,
84, 85, 157, 199, 200).^{29/}

CDOT has done no investigation to determine how much time, if
any, will be available under the 16(b)(2) program to transport the
handicapped public (T. 158).

The court's next statement was:

In addition, steps are being taken in
various parts of the state to develop
either dial-a-bus or fixed route services
for the handicapped utilizing smaller buses.
Experimental programs may be developed and
enlarged as demand is established.^{30/}

^{29/} Such expenditures are not special efforts. See page 55 *infra*.
^{30/} Memorandum Opinion, footnote 10.

The only evidence of proposed state involvement in a program of this nature may be found in the transcript of testimony at the preliminary injunction hearing (T. 227-234, 248-250, 251, 261-263, 312). The testimony is to the effect that CDOT proposed to delete the purchase of two full sized buses, at a cost of approximately \$130,000 and with that \$130,000 purchase and operate 10 van type vehicles for fixed routes in the city of New Haven. However, the testimony clearly indicates that this was only a proposal that was thrown together quickly in an attempt to resolve the pending litigation and was not intended as a firm commitment that would be carried out regardless of the outcome of the litigation (T. 262, 265, 298-303).

The plaintiffs believe that this ten van proposal was so vague and uncertain as to dispute the court's finding that steps were being taken to establish such a system and that there was a commitment to enlarge the system once demand was established. In fact, and defendants cannot dispute this, the idea for the system never proceeded any further than as testimony at trial.

There was also testimony regarding some wheelchair accessible vans that a few towns in the Hartford urbanized area were purportedly seeking to obtain for the 1976-1977 fiscal year (T. 154, 155, 242, 243, 246, 349-351). However, it is clear that there was no state financial involvement in this plan (T. 285-287); that it was uncertain whether the cities and towns would be able to provide the required local matching funds to initiate the program (T. 288, 327); that towns which provide local matching funds greatly restrict van use to the people who live in the town (T. 290, 351); that the proposal

was developed by the Greater Hartford Transit District out of sheer desperation in order to meet emergency transportation needs of the handicapped (T. 348-351); that the vehicles would be used to replace town vehicles that currently transport the elderly only; and that the proposal was not intended as a regional transportation system for the handicapped (T. 349).

Plaintiffs contend that the speculative nature of this project and the absence of state involvement show that the court's finding that a dial-a-ride system providing mass transportation for the mobility handicapped would be established and improved as a state special effort was clearly in dispute.^{31/}

The District Court also found that CDOT was participating in a demonstration project in the Westport Transit District that apparently provides transportation for the mobility handicapped in Westport, Connecticut. The court's only source of information regarding this project was contained in a letter from an attorney employed by the Connecticut Department of Transportation dated December 10, 1976. Attorney Lynch was not an Assistant Attorney General who represented CDOT in this matter as the court implies.^{32/} The letter was merely an unsworn statement submitted to the court by an interested party several days before its memorandum of decision was filed. It is not clear from the statement in the letter whether the allegations are based on Mr. Lynch's personal knowledge, or whether

^{31/} It is also quite clear from federal guidelines that such un-coordinated restrictive services cannot be considered as deriving from local special efforts. See appendix to 49 C.F.R part 613, 41 Fed. Reg. 18234 (April 30, 1976).

^{32/} See Mem. Op., footnote 10.

state involvement in the Westport project would be relevant to establish special efforts in another urbanized area. Plaintiffs had no opportunity to cross-examine Mr. Lynch to obtain the particulars of state involvement and the extent of his knowledge about the project or to present affidavits to dispute Mr. Lynch's assertions. The plaintiffs believe, for example, that this project serves no individuals in any of the urbanized areas involved in this litigation and therefore, does not qualify as state special efforts. In these circumstances, we believe that the court should have disregarded Mr. Lynch's letter as being in non compliance with Rule 56 (e) ^{33/} and not found that CDOT's unspecified involvement in transportation in Westport, Connecticut constituted special efforts within 49 U.S.C. 1612(a).

The court's finding that CDOT is making "good faith" efforts to design its mass transportation system so that the handicapped can effectively use it is disturbing. UMTA's letter approving CDOT's application to purchase 280 inaccessible buses stated that CDOT was making no present specific commitment to provide mass transportation to the handicapped. ^{34/} The evidence presented below established that CDOT's only efforts in this area were limited to capital assistance to private non-profit organizations under the 16(b)(2) programs. Although defendants' testimony and affidavits stress their involvement in this program as satisfactory special efforts, nowhere did they show that 16(b)(2) vans would be available to transport the handicapped public. Apparently, the court itself was unsure of this, for it found that these 16(b)(2) vans will

33/ Fed. R. Civ. P. 56(e)

34/ Plaintiffs' Exhibit A (letter from Robert Patricelli to James F. Shugrue dated May 12, 1976).

provide "at least some transport for those in wheelchairs."^{35/} While no evidence was presented to support the CDOT's finding that 16(b)(2) vans will be available to transport the handicapped public, considerable evidence was presented to the effect that they will not be so available. In light of UMTA's authorizative determination that 16(b)(2) van use can be considered a special effort only to the extent they are available to the handicapped public,^{36/} together with the uncontroverted testimony of plaintiff's witnesses Preneta, Marcella, Gill and Meath, defendants have not established that there is no genuine issue as to whether the 16(b)(2) vans they rely upon can be considered a special effort within 49 U.S.C. 1612(a).

One question not carefully considered by the court below is the extent of state planning efforts. The record clearly indicates that CDOT has undertaken no transportation planning for the handicapped in Stamford and New Haven (T. 306, 316, 297, 248, 242), or in Hartford except for that included in plaintiff's Exhibit E which was never carried out. This is true despite the fact that CDOT has virtually all of the planning staff (T. 184, 274, 326, 327), all of the funds to initiate proposals (T. 354, 355), and has joint responsibility to initiate planning proposals.^{37/} Defendants failed to establish that there was no genuine issue as to whether CDOT made special efforts in planning within the requirements of 49 U.S.C.1612(a).

^{35/} Memorandum Opinion, footnote 10

^{36/} Appendix to 49 C.F.R. Part 613, Subpart B

^{37/} See footnote 4, supra.

d. Summary Judgment is Improper Where Questions of Motive and Intent are Involved

The court concluded at page 9 of its Opinion that absent "an affirmative exclusion", section 504 affords plaintiffs no basis for relief, citing Snowden v. Birmingham-Jefferson County Transit Authority^{38/} and United Handicapped Federation v. Andre^{39/} for the proposition that unless the defendants actually prevent the handicapped from getting on the buses (if some how they were able to get assistance to do so) there is no discrimination. In making this determination, the court thus reached certain conclusions as to the defendants' motives or state of mind from an evaluation of the events leading up to and including the submission of, and approval for, the purchase by CDOT of several hundred inaccessible buses. Since information relating to state of mind is within the exclusive possession of CDOT and UMTA and can be evaluated only on the basis of circumstantial evidence,^{40/} the plaintiffs should have had an opportunity to marshal the facts at a full trial before a final judgment was rendered. It is settled law that in actions in which an issue involves the movant's state of mind, summary judgment should be denied.^{41/} Further, where a determination as to defendants' state of mind entails the drawing of factual inferences as to which reasonable men might differ,

^{38/} 407 F. Supp. 394 (1975) affirmed, 551 F. 2d 862 (1977).

^{39/} 409 F. Supp. 1297 (1976).

^{40/} See Washington v. Davis, 426 U.S. 229, 253 (1976) (Justice Stevens concurring).

^{41/} Lemelson v. Ideal Toy Corp., supra; Colby v. Klune, 178 F. 2d 872 (2nd Cir. 1949).

summary judgment is an inappropriate means of disposing of a case.^{42/}

The plaintiffs have already adduced the following facts providing circumstantial evidence of defendants' discriminatory intent to exclude the handicapped from the public mass transportation system:

One, in August of 1975 the Metropolitan Planning Organization for the Hartford urbanized area adopted a five year Transit Development Plan (TDP) which was subsequently approved by UMTA.^{43/}

Two, the TDP provided for public (CDOT) take over of bus operations in the Hartford urbanized area and for the establishment of a coordinated regionwide transportation system for the handicapped. Both operations were given the same priority (T. 341 - 343).

Three, although public takeover of the public transportation operations has been effected, no action has been taken to implement a coordinated regionwide public transportation system for the handicapped in the Hartford urbanized area (T. 141 - 146).

Four, there is no low cost public transportation for the handicapped in the Hartford, New Haven or Stamford urbanized areas (T. 76, 77- 81, 83, 207, 208, 214).

Five, CDOT has been aware of the unavailability of low cost mass transportation for the handicapped in the Hartford urbanized area for some time (T. 146, 147, 344-347).

^{42/} See footnote 14, supra.

^{43/} Plaintiffs' Exhibit E (T. 142, 143, 240, 241).

Six, there are no plans to make mass transportation available to the mobility handicapped in the New Haven or Stamford urbanized areas (T. 297, 306).

Seven, CDOT's application for federal funds to purchase public transportation services in the Hartford, New Haven and Stamford urbanized areas includes no vehicles that serve the handicapped.^{44/}

Eight, the application further states that routine replacement buses will contain special provisions for the handicapped "as directed by UMTA", including verticle stanchions, non-skid floor, improved interior lighting and low level entrances with stepwell lighting,^{45/} none of which will make the replacement buses effectively usable by the mobility handicapped.

Nine, the application recites facilities and services purportedly available to the handicapped.^{46/} In fact, none of the facilities or services so enumerated provide reliable low cost public transportation for the handicapped (T. 77, 82).

Ten, the grant application did not specify how CDOT, upon taking over the public mass transportation system, planned to make available vehicles or services which could be effectively and readily used by the mobility handicapped.

Eleven, on May 12, 1976, UMTA approved CDOT's application in a letter which read in part:

"I am concerned about the lack of any present specific commitment on the part of CDOT to provide to the elderly and the physically handicapped in the Hartford, New Haven and Stamford areas mass transportation services

^{44/} Exhibit M to plaintiffs' Exhibit A.

^{45/} Id.

^{46/} Id.

which they can effectively use".^{47/}

Twelve, despite this CDOT advanced no plans to the court to provide reliable low cost mass transportation to the mobility handicapped in the Hartford, New Haven and Stamford urbanized areas.

Thirteen, CDOT has decided to provide only fixed route inaccessible services although its legislative bond authorization specifically mentions vehicles and services for the handicapped (T. 408).

Fourteen, CDOT has made an administrative decision to limit state financial involvement in providing transportation service to the handicapped to providing private non-profit agencies that service the handicapped with vans under 16(b)(2) program (T. 409-411). Establishment of separate "supplementary services" for the handicapped is considered the responsibility of cities and towns not the state (T. 318, 319).

Fifteen, CDOT has undertaken no studies and has failed to evaluate studies done in other parts of the country on the most cost-efficient way to provide reliable low-cost mass transportation to the handicapped. (T. 302-303).

Sixteen, accessible standard size vehicles can be purchased if CDOT chose to do so (T. 17-20, 28, 47, 48-54, letter from Bass Dyer, 49 C.F.R. 609.15(a)).

Seventeen, standard size buses can also be made accessible to the mobility handicapped through a "retro-fitting" process (T. 12, 27, 226, 227).

^{47/} Plaintiffs' Exhibit A.

Eighteen, low cost mass transportation could also be provided to the mobility handicapped through the purchase and operation of smaller van type accessible vehicles (T. 243-245).

On similar facts, the District Court in Bartels v. Biernat^{48/} held that local and federal officials knowingly excluded handicapped individuals from mass transit services. Certainly reasonable minds might disagree as to inferences that might be drawn from these facts. The court erred in finding that the defendants did not intentionally violate 29 U.S.C. §794 by resolving inferences from the above facts prematurely in a summary judgment motion.^{49/}

The District Court erred in similarly resolving inferences from the above-mentioned facts against plaintiffs prematurely on a summary judgment motion with respect to plaintiffs' claim that defendants' conduct establishes circumstantially that defendants knowingly violated plaintiffs' rights secured by the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.^{50/}

e. Summary Judgment Is Improper Where Important Public Issues or Constitutional Questions Are Raised

There can be little doubt that this litigation presents issues of immense importance to handicapped individuals and to society as a whole. Victory or failure here may mean the difference between

^{48/} 427 F. Supp. 226 (1977).

^{49/} Empire Electronics Co. v. U.S., supra.

^{50/} See Washington v. Davis, supra, Mr. Justice Stevens' concurring opinion for the method of showing discriminatory intent.

continued unproductivity and poverty of handicapped individuals as opposed to independent living and gainful employment secured after sufficient mobility through use of public transportation has been secured. These novel constitutional and statutory claims are presented in the framework of conflicting factual assertions regarding mass transportation systems in three large urbanized areas in Connecticut. Certainly, full factual development should be allowed before issues of such complexity and novelty are decided.^{51/}

^{51/} Askew v. Hargrave, supra.

2. The District Court Erred in Holding that 29 U.S.C. §794 (Section 504 of the Rehabilitation Act of 1973) was Insufficient As a Basis for Relief

The District Court below held that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, standing alone without implementing regulations, was insufficient as a basis for relief absent specific affirmative acts by the State of Connecticut to exclude the elderly or handicapped from public transportation. Plaintiffs believe that the court erred in this holding; that section 504 of the Rehabilitation Act does give rise to a private cause of action which plaintiffs have standing to assert, and that regardless of implementing regulations, the Act does prohibit the use of federal funds in the development of transportation systems that are inaccessible to the handicapped. The plaintiffs also assert that the defendants, by their actions and the foreseeable consequences of said actions, have intentionally discriminated against plaintiffs and the members of their class.

- a. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) Give Plaintiffs a private Right of Action to Enforce Their Rights Under the Statute

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 states:

No otherwise qualified^{52/} handicapped individual in the United States, as defined in Section 7(6) (29 U.S.C. §796(6)) shall solely by reason of his

^{52/} The meaning of the term "otherwise qualified" has been a source of great confusion. Thus in the final regulations issued by the Department of Health, Education and Welfare, under section 504, in Appendix A the term "qualified handicapped person" is substituted. (45 C.F.R. 84.1 et. seq.) "The Department believes that the omission of the word 'otherwise' is necessary in order to comport with the intent of the statute because, read literally,

handicap, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

.. For purposes of section 504 of the Act, a "handicapped individual" is defined as:

[A]ny person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.
29 U.S.C. §706(6).

Section 504 was originally introduced by Rep. Vanik^{53/} and Senators Humphrey and Percy^{54/} with the intention that the prohibition against discrimination on the basis of handicap be included within the scope of Title VI. Subsequently, and with the approval of Senator Humphrey^{55/} the section was instead included as part of the Rehabilitation Act of 1973, 29 U.S.C. §701 et. seq.

Little legislative history is available from the period of original enactment of section 504 but a year later, when the Rehabilitation Act Amendments of 1974 were considered, there is clear language evidencing the intent and function of section 504, including

(cont.)

.. 'otherwise' qualified handicapped persons include persons who are qualified, except for their handicap, rather than in spite of their handicap;" (the example being given, the blind bus driver). Thus section 84.3(k) defines "qualified handicapped person" with respect to services as "a handicapped person who meets the essential eligibility requirements for the receipt of such services." (In terms of public transportation therefore, a "qualified handicapped person" would appear to include one willing to abide by the usual bus regulations including payment of bus fare).

53/ H.R. 12154 was introduced on December 9, 1971, at 117 Cong. Rec. 45945 (1971).

54/ S. 3044 was introduced on January 20, 1972, at 118 Cong. Rec. 525-526 (1972).

55/ 118 Cong. Rec. 32310 (1972).

language that the proscription against discrimination included the area of mass transportation funding.^{56/}

Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services or any other Federally-aided programs. (Emphasis added)^{57/}

Further, the legislature history makes it clear that the fact that the language of the Act was similar to other civil rights statutes was not coincidental:

[The section] was patterned after, and is almost identical to, the anti-discrimination language of §601 of the Civil Rights Act of 1964 and §901 of the Education Amendments of 1972, The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form and such regulations and enforcement are intended [by this Committee and by Congress.] 4 U.S. Code Cong. and Administrative News 6390 (1974).

The language of Section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts This approach to implementation of Section 504, which closely follows the models

^{56/} See Red Lion Broadcasting Co. Inc. v. Federal Communications Commission, 395 U.S. 367, 380-381 (1969) in which the court said, "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."

^{57/} S. Rep. No. 1297, 93d Cong., 2d Sess. 38 (1974).

of the above-cited anti-discrimination provisions, would insure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation and also permit a judicial remedy through a private action. S. Rep. No. 93-1139, 93d Cong. 2d Sess. 24-25 (1974). (Emphasis added)

Thus, legislative history indicates that Congress intended a private right of action to be read into the statute to provide one way for the rights implicit within it to be indicated. Further support for this conclusion may also be found through application of the test enunciated by the United States Supreme Court in Cort v. Ash, 422 U.S. 66, 78 (1975):

First, is the plaintiff 'one of the class for whose ESPECIAL benefit the statute was enacted,' (emphasis supplied) --- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state laws, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? (Citations omitted)

In the case of Lloyd v. The Regional Transportation Authority, et. al., supra, the Court of Appeals on facts similar to the ones here, found that applying the Cort factors to the legislative history of section 504 and the purposes of the Rehabilitation Act itself led the court to the conclusion that a private cause of action must be implied from section 504.

As in Lloyd, plaintiffs are clearly "one of the class for whose ESPECIAL benefit the statute was enacted. Cort v. Ash, supra, at 78.

Marilyn Young is afflicted with spina bifida and paralysis as the result of a spinal cord tumor and is confined to a wheelchair.

(Stipulation of Facts in Lieu of Transcript of Testimony of Marilyn Young). Joyce Baker, who has cerebral palsy is also mobility handicapped and is unable to perform such maneuvers as ascending or descending steps on mass transportation buses. (Stipulation of Facts in Lieu of Transcript of Testimony of Joyce Baker). Both plaintiffs live on or near bus routes and wish to be able to make use of public bus services in order to participate in daily events of living, namely jobs, education and entertainment. As testified to at trial, (Transcript 63, 215, 356) thousands of mobility handicapped citizens are without any means of public transportation. The State of Connecticut has no plans in the renovation and expansion of its bus system to change this situation.

Neither can there be any question that a private cause of action is in concert with the underlying purposes of the legislative scheme. 29 U.S.C. §794 was enacted as part of an over all package of requirements imposing legal obligations on recipients of federal funds. 29 U.S.C. §793 sets affirmative action requirements on federal contractors who enter into government contracts exceeding \$2,500.00. (This section is enforced by the Department of Labor and implementing regulations were promulgated at 41 Fed. Reg. 16147 [April 16, 1976]). 29 U.S.C. §792 created the Architectural and Transportation Barriers Compliance Board, which among other things was constituted to enforce federal statutes requiring "barrier-free"

construction in federal building projects. ^{58/}

.. 58/ The lower court mistakenly thought 29 U.S.C. §792(c)(1) which describes the additional functions of the Architectural and Transportation Barriers Compliance Board was a part of §794 (Section 504 of the Rehabilitation Act), instead of both §792 and §794 correctly being separate statutes within the Rehabilitation Act itself, 29 U.S.C. §701 et. seq. (Dist. Ct. Mem. Op. p. 10).

The court thus erred in holding that because 29 U.S.C. §792(c)(1)(A) authorized the Board,

to consider ways in which travel expenses in connection with transportation to and from work for handicapped individuals can be met or subsidized when such individuals are unable to use mass transit systems or need special equipment in private transportation,

that section 794 was as a result in conflict with section 792 if it were read so as to prohibit the use of federal funds in the purchase of inaccessible vehicles. There is, on the contrary, nothing inconsistent in such a reading of the statutes. It is clear that at the time the Rehabilitation Act passed in 1973, in most areas of the country inaccessibility was the rule; thus authorizing the Board to deal with the then existing situation in no way conflicted with the requirement under 794 that as to the future use of federal money in the purchase of new transportation vehicles that effective accessibility be required.

Further, §792(c)(2) also directs the Board to:

.. determine what measures are being taken, especially by public and other non-profit agencies and groups having an interest in and a capacity to deal with such problems, (A) to eliminate barriers from public transportation systems (including vehicles used in such systems), and to prevent their incorporation in new or expanded transportation systems.....

.. Thus the two statutes can and should be read together as intending to foster a coordinated effort toward enabling handicapped persons to deal with the existing transportation system and at the same time strive towards eliminating transportation barriers in the future. As stated in Senate Report No. 93-318, U.S. Congressional and Administrative News (1973) at p. 2122, "Such a unit [The Architectural and Transportation Barriers Board] will enhance the

Other courts have also found that section 504 gives a private right of action to handicapped persons.^{59/} In Hairston v. Drosick, 423 F. Supp. 180 (S.D. W.Va. 1976) and Rhode Island Society for Autistic Children v. Board of Regents for Education for the State of Rhode Island, Civil Action No. 5081 (D.R.I. August 1, 1975), courts found a private right of action by disabled children seeking the provision of education under the mandate of section 504. In Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976) the court found a private right of action existed under section 504 in the attempts by a blind teacher to obtain employment with the Philadelphia school system. In Bartels v. Biernat, *supra*, a case similar to the one before the court here, judgment was entered on behalf of a group of handicapped persons seeking to enjoin the expenditure of federal funds in the development and purchase of buses that would be totally inaccessible to mobility handicapped persons. Finally, in Kampmeier, et. al. v. Nyquist, et. al., Docket No. 76-7383 (Decided April 15, 1977) an appeal from a denial of a preliminary injunction

cont. effectiveness of the other provisions of the bill since even were the maximum employment opportunities for the handicapped fully created, they could not be filled without the ability of handicapped individuals to get their jobs The Committee feels that to justify the expenditures authorized under this bill, it is imperative that handicapped individuals be given the opportunity to move freely in the society into which they must integrate themselves."

^{59/} But see Snowden v. Birmingham-Jefferson Transit Authority, et. al., 407 F. Supp. 394 (N.D. Ala. 1975) affirmed, 551 F.2d 862 (1977) (5th Cir.) United Handicapped Federation v. Andre, 409 F. Supp. 1297 (D. Minn. 1976) appeal docketed, No. 76-1396 (8th Cir. April 20, 1976) and Webb v. Miami Valley Regional Transit Authority, Civil No. C-3-75-67 United States District Court, S.D. Ohio (January 19, 1976).

in which a one-eyed child was seeking to force school officials to allow him to participate in contact sports, THIS court held:

.. Thus we think it probable that the plaintiffs
do have standing to sue; they are the people
.. in the best position to enforce §504, which
is designed specifically for their protection.
(Footnote omitted)

b. Section 504 Prohibits the Use of Federal Funds to Purchase Inaccessible Buses for a Transportation System That Is and Will Continue to Be Inaccessible to Mobility Handicapped Persons

The court below found that absent proof of a clear intent to discriminate, section 504 is insufficient standing alone, to afford plaintiffs the relief they are seeking.

Plaintiffs contend that the court erred in so holding, and that section 504 standing alone does prohibit the funding of transportation projects that will be inaccessible to mobility handicapped persons particularly where it is technologically feasible to make them accessible. (T. 19, 22, 57) ^{60/}

As described earlier, section 504 was patterned after section 601 of the Civil Rights Act of 1964. Thus a look at how courts have viewed the scope of section 601 is appropriate.

..
.. ^{60/} It is ironical that the federal defendants in their lower court brief denied that section 504 mandates effective accessibility but now, in the Secretary of Transportation's policy statement on the development of TRANSBUS, the Secretary cites section 504 as basis for his decision to mandate the use of TRANSBUS after September 30, 1979. (Decision of Brock Adams, Secretary of Transportation, to Mandate TRANSBUS, May 19, 1977).

The seminal case interpreting section 601 is Lau v. Nichols,
supra, in which the Supreme Court, relying on the statute, required
the San Francisco school system to provide special language education
services to approximately 1,800 non-English speaking students. The
court there held that proof of intent to discriminate was not
required under the statute for plaintiffs to prevail, if the state's
action had the "effect" of discriminating:

Under these state-imposed standards, there is no
equality of treatment merely by providing students
with the same facilities, textbooks, teachers, and
curriculum; for students who do not understand
English are effectively foreclosed from any mean-
ingful education. (Lau at p. 566)^{61/}

In Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) the
Supreme Court held that Title VII prohibited an employee from
requiring a high school education as a condition of employment.
Although the court found that the company lacked any discriminatory
intent, the court nevertheless held that the education requirement
violated the Act since many more Blacks than Whites were excluded
from employment because of it. The court stated:

Good intent or the absence of discriminatory
intent does not redeem employment procedures
or testing mechanism that operate as "built-in
headwinds" for minority groups and are unrelated
to measuring job capability.

^{61/} In recent Supreme Court decisions, the continuing validity of
the "effects" test has been upheld in cases where the court has
distinguished discrimination cases brought under the authority
of Title VI and Title VII from those brought under the Fifth and
Fourteenth Amendments where a more stringent standard applies.
See General Electric Company v. Gilbert, et. al., U.S.
45 L.W. 4031, 4034 (1976), and Washington v. Davis, 426 U.S. 229,
96 S. Ct. 2040 (1976).

Similarly, in the case at hand, by presumably allowing handicapped persons to use the public bus system, if they can find a way to surmount the barriers the stairs present to them, affords no equality of treatment; for handicapped persons, who cannot mount stairs or are confined to wheelchairs, are effectively foreclosed from using the service.

The District Court below relied on Lau for the proposition that without implementing regulations ^{62/} section 504 (like §601) is too unspecific and precatory to support the suggested interpretation offered by plaintiffs. Such a position reflects a misreading of Lau, however. In the majority opinion the court clearly states at page 566:

We do not reach the Equal Protection Clause argument which has been advanced but rely solely on section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d, to reverse the Court of Appeals. (Emphasis added)

Further, even the concurring opinion, cited by the court below (Mem. Op. at p. 9) does not actually state that §601 standing alone is insufficient as a basis for a finding of discrimination. At the most, Justice Stewart states, "it is not entirely clear"; at the least, he agrees that the interpretation by Health, Education and

^{62/} The District Court erroneously assumed that no regulations had been promulgated pursuant to section 504 "which would extend the proscriptions of section 504 into the area of transportation funding." (Mem. Op. p. 9) See also footnote 14 in Lloyd, supra, p. 1281. However, regulations have been implemented at 49 C.F.R. 600 et. seq., which do clearly bring transportation funding within the scope of section 504.

Also in Lloyd, supra, the Court of Appeals found that because of the near identity of language in section 504 and section 601 that Lau was dispositive of the fact that section 504 establishes affirmative rights.

Welfare requiring affirmative action even in the absence of intent to discriminate, is a reasonable interpretation of section 601.^{63/}

In Bossier Parish School Board v. Lemon, 370 F. 2d 847, 852 (5th Cir. 1967) cert. den., 388 U.S. 911 (1967), a decision in which now Chief Justice Burger participated, the court found that section 601, without any implementing regulations, afforded rights to the private plaintiffs which they could assert to challenge the defendant's policies which prevented them from attending the local school system free from segregation.^{64/}

^{63/} The Court in Lloyd, supra, at p. 1281, relied on regulations that had been promulgated by UMTA, partially pursuant to section 504, in finding for the handicapped plaintiffs, but also held that:

..... the opinion of the court in Lau can be read as authority for allowing this action to proceed under section 504 alone

^{64/} "In the absence of a procedure through which individuals protected by section 601's prohibition may assert their rights under it, violations of the law are cognizable by the courts." Bossier Parish, at p. 852.

Although the District Court did not rule on the question, the defendants' below argued that jurisdiction did not lie under section 504, applying the doctrine of "primary jurisdiction," and they relied on the case of Bradford School Bus Transit Inc. v. Chicago Transit Authority, 537 F. 2d 943 (7th Cir. 1976) in support of their position.

However, that case is clearly distinguishable from the case at bar. In Bradford, supra, regulations had been promulgated requiring exhaustion of administrative remedies prior to the institution of suit. No such regulations are in effect in this case. The administrative procedures promulgated by the Secretary of Health, Education and Welfare apply only to agencies in receipt of Health, Education and Welfare funds. As stated in Lloyd, supra,

There being no administrative remedy open to these plaintiffs, neither the exhaustion nor primary jurisdiction doctrine applies. Rosado v. Wyman, 397 U.S. 397, 405-406 (1970).

Congress made it clear that section 504 was intended to be more than a precatory statement prohibiting intentional discrimination. The Report of the Senate Committee on Labor and Public Welfare states:

Where applicable, section 504 is intended to include a requirement of affirmative action as well as prohibition against discrimination. S. Rep. at 1297, 93 Cong. 2nd Sess. 39 (1974).

Plaintiffs thus believe that the District Court erred in holding that absent clear discriminatory intent, section 504 is insufficient standing alone to require CDOT to develop concrete plans to provide mass transportation to the handicapped.

However, plaintiffs also believe that the lower Court's holding that no regulations implementing section 504 have been promulgated is incorrect. (Mem. Op. at 9). ^{65/} Final regulations were promulgated on April 30, 1976, (effective May 31, 1976) under the authority of 49 U.S.C. §1612(a) and 29 U.S.C. §794. ^{66/} Proposed ^{67/} and final ^{68/} regulations were also issued by H.E.W. under section 504.

^{65/} See footnote ⁶² .

^{66/} 49 C.F.R. parts 609 and 613, 41 Fed. Reg. 18234 et. seq., (April 30, 1976).

^{67/} 41 Fed. Reg. 29560 et. seq. (July 16, 1976)

^{68/} The 45 C.F. R. Part 84 promulgation of the H.E.W. regulations came as the culmination of a series of actions which sought to bring the promise of section 504 into full fruition. After three years of inaction, the case of Cherry v. Mathews was filed in February 1976, 419 F. Supp. 922 (D.C. 1976) seeking to require H.E.W. to promulgate regulations. Two months later, President Ford issued Executive Order 11914 (41 F.R. 17871 April 29, 1976) authorizing H.E.W. and other federal agencies disensing funds, to adopt rules and regulations under 504. It also designated the Department of H.E.W. as the agency with the responsibility for establishing standards and determining "discriminatory practices" as well as coordinating the

In Lloyd v. The Regional Transportation Authority, supra, plaintiffs sought to enjoin the purchase of new buses when the existing system and the new buses would be effectively inaccessible to the mobility handicapped. Although 49 C.F.R. parts 609 and 613 and 45 C.F.R. part 84 had not then been promulgated, the Seventh Circuit Court of Appeals relied on these regulations to reverse the lower court's dismissal of plaintiffs' complaint. The Court of Appeals used these regulations to determine the level of mass transportation services that must be provided handicapped persons under section 504 and remanded the case to the District Court to analyze defendants' efforts in light of these standards.

The Lloyd court relied on the fact that 49 C.F.R. part 613 is couched in affirmative language and relied on specific illustration of special efforts ^{69/} set out in the regulations to suggest that defendants had an obligation to establish a remedial program of substantial

cont.

implementation of §504 by all federal agencies. Then, a little more than a month after judgment was entered in Cherry v. Mathews, supra, for plaintiffs, proposed regulations were issued by H.E.W. The final regulations were issued May 4, 1977, with an effective date of June 3, 1977.

^{69/} The examples given are the following:

"1. A program for wheelchair users and semiambulatory handicapped persons that will involve the expenditure of an average annual dollar amount equivalent to a minimum of five percent of the section 5 [49 U.S.C. §1604] apportionment to the urbanized area. These 'five percent funds' may be derived from sources other than section 5. The term 'average' permits lower expenditure years to be balanced by higher expenditure years but does not permit an initial delay in implementing projects. The term 'section 5 apportionment' refers to UMTA's formula apportionment for areas with a population of 200,000 or more and to the Governors' apportionment for areas with population of 200,000 or more and to the Governor's apportionment for areas with a population under 200,000. Projects that qualify as local 'special efforts' for wheelchair users and other semiambulatory persons under the initial paragraphs of this advisory information would be counted in computing the five percent.

scope. 70/

The court determined that the planning regulations required a two-tiered analysis to determine the level of effort that must be complied with. First, the level of services provided the general public must be determined and second, the transportation system must be analyzed to determine whether the services provided the mobility handicapped are reasonable by comparison with the services offered the general public and also meets a significant fraction of the actual transportation needs of such persons within a reasonable time. While the specific illustrations set forth in the appendix to 49 C.F.R. part 613 were mentioned, the court was careful to point out that the examples given were not intended to be maximums and that a particular planning effort might be insufficient even if it paralleled one of the illustrations given if it was not also "reasonable by comparison" and did not also meet a significant fraction of the actual transportation needs of the mobility handicapped.

cont.

"2. Purchase of only wheelchair-accessible new fixed route equipment until one-half of the fleet is accessible, or, in the alternative, provision of a substitute service that would provide comparable coverage and service levels.

"3. A system of any design, that would assure that every wheelchair user or semiambulatory person in the urbanized area would have public transportation available is requested for 10 round-trips per week at fares comparable to those which are charged on standard transit buses for trips of similar length, within the service area of the public transportation authority. The system could, for example, provide trip coupons to individuals who would then purchase the needed service." 41 F.R. 18234 (April 30, 1976).

70/ Lloyd v. Regional Transportation Authority, supra, at page 1283.

The court then compared UMTA's regulations with those promulgated by H.E.W. recognizing that although not specifically applicable to transportation funding, their interpretation of section 504 is entitled to great weight given H.E.W.'s recognized expertise in civil rights matters. 71/

The Seventh Circuit Court of Appeals found that these proposed regulations emphasized even further the right of handicapped persons to a level of services that is as effective as that provided to others, 72/ and that where it is necessary for handicapped persons to have separate services in order for transportation to be as effective, it should be provided. 73/ The court also pointed out,

71/ See Executive Order 11914, 41 Fed. Reg. 17871 (April 29, 1976) and 4 U.S. Code Cong. and Administrative News 6391 (1974); Mourning v. Family Publications Services, Inc., 411 U.S. 356 (1973).

72/ Final regulation section 84.4(b)(1) states that a recipient of federal funds may not, among other things:

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit or service that is not as effective as that provided to others;

73/ ...[D]ifferent or special treatment of handicapped persons, because of their handicaps may be necessary in a number of contexts in order to ensure equal opportunity. (Supplementary Information preceding final regulations).

however, that the regulations make unnecessarily separate services discriminatory. ^{74/}

In concluding its analysis of the statutes, the Lloyd court found that plaintiffs possessed substantial, significant rights which they could assert, on par with the plaintiffs' rights in Lau v. Nichols, supra, at 1284. The court thus remanded the case to the District Court to determine whether the efforts of the defendants measured up to the high standard required by the statutes.

Bartels v. Biernat, supra, applied the Lloyd standards to a factual situation strikingly similar to the one presented by this litigation. That court found that 30 privately owned accessible vehicles devoted to demand-response service at a cost exceeding \$4.00 per ride, and twenty-five (25) buses operated by non-profit organizations, thirteen (13) of which were restricted to special uses and

^{74/} (iv) Provide different or separate aid, benefits, or services to handicapped persons ... unless such action is necessary to provide qualified handicapped persons with aid, benefits or services that are as effective as those provided to others. Final Regulations, section 45 C.F.R. §84.84(b)(iv).

This is particularly relevant to the situation in Connecticut where the defendants have refused to provide any standard-size main line buses with lift devices which would enable the handicapped to travel with the rest of the general public, but have relegated them to only supplemental services which the record shows are woefully inadequate.

The decision of the Secretary of Transportation on May 19, 1977, to mandate TRANSBUS as of September 1979, may also be a reflection of this action. Unfortunately, this policy will do nothing to provide accessible non-segregated transportation to the plaintiffs, who, if the buses are ordered as planned, will remain segregated for the next twelve to fifteen years; the life span of the new buses.

.. nine(9) of which were restricted as to the area served, did not constitute equivalent services or effective access to mass transportation in Milwaukee County where the existing public transportation system served only the ambulatory public.

.. The court went on to say that since plans did not exist to provide mass transportation to the handicapped, the purchase of one hundred new effectively inaccessible buses and the federal defendants' approval of Milwaukee County's application, knowing that the existing system and the one hundred new buses would be effectively inaccessible constituted exclusion of handicapped individuals from the benefits of mass transportation in violation of 29 U.S.C. §794.

The District Court below made no similar analysis. It incorrectly held that a much lower standard of performance satisfied section 504, requiring little or no low cost reliable public transportation for the handicapped so long as no "affirmative exclusion" could be found (Mem. Op. at p. 9).

.. The District Court also failed to evaluate the transportation services that were being provided or planned to see if they were "reasonable by comparison with" mass transportation services provided the ambulatory public or "met a significant fraction" of the transportation needs of mobility handicapped individuals. Instead it held that informal assurances by attorney Lynch (see Mem. Op. footnote 5) that CDOT would comply with the regulations set out at 41 Fed. Reg. 18234 et. seq. coupled with CDOT's participation in programs mentioned in footnote 10 of the court's memorandum opinion, constituted compliance with the planning, design and anti-discrimina-

tion provisions of 29 U.S.C. §794 and 49 U.S.C §1612(a). The court relied on the states' assurances that they would comply with the regulations despite their obvious complexity, and despite the federal defendants' dispersal of federal funds to the state even though the federal defendants knew the state was in non-compliance with earlier enacted regulations (23 C.F.R. part 450.120(a)(5) and 49 C.F.R. 613.200).

Plaintiffs believe that proper analysis of the facts presented in this matter necessarily leads to a different result. Here, for example, as in Bartels, supra, no concrete plans exist to provide mass transportation to the handicapped in the Stamford or New Haven urbanized areas (T. 242, 248, 306), and the past plans developed for the Hartford urbanized area have not been carried out despite CDOT's responsibility to make such plans. (T. 359).^{75/} Also, while the Bartels court found that private non-profit agency vehicles restricted in use to agency clientele did not constitute effective access to mass transportation, the federal and state defendants rely heavily on their purchase of 16(b)(2) vans for private agency operation to satisfy the statutory mandates although use is similarly restricted.

However, close scrutiny of 49 C.F.R. part 613 makes clear that such expenditures cannot be considered special efforts:

Projects funded by UMTA under 16(b)(2) may be identified as deriving from local special efforts to meet the needs of wheelchair users and semi-ambulatory persons only to the extent that ...

(3) the service is not restricted to a particular organizational or institutional clientele ...

^{75/} Letter from Robert Patricelli, UMTA Administrator, to James Shugrue, dated May 12, 1977, approving CDOT's application for capital assistance and placing responsibility for providing mass transportation to the handicapped squarely on the shoulders of CDOT, (Plaintiffs Exhibit A) and 49 C.F.R 613.200 ; 23 C.F.R. 450.113.

41 Fed. Reg. 18234 (April 30, 1976).

Similarly, while the Bartels court found that demand-response vehicles that were operated only in certain areas did not constitute effective access to mass transportation, similarly restrictive and uncoordinated services provided by towns in the Hartford urbanized area were found sufficient. The court should not have considered such services to be state special efforts in the absence of state financial participation and in light of the fact that such services where uncoordinated, may not be considered local special efforts.^{76/}

Finally, CDOT, like Milwaukee County Transit Authority, has decided to purchase no accessible vehicles leaving handicapped persons with whatever separate services private organizations or towns may provide. Such service is clearly not reasonable in light of what CDOT provides the general public or equivalent to it.

Not only is it unclear from the lower court's opinion whether the court analyzed the state's efforts to see if equivalent services or effective access would be provided handicapped persons but it is also unclear whether the court even measured Connecticut's efforts against minimal illustrative levels of service set out in the appendix to 41 Fed. Reg. 18234. If the court had done so, Connecticut's efforts would have been shown to fail both tests.

^{76/} "If service and resources thus coordinated meet the four conditions for eligible section 16(b)(2) services... then those services and resources themselves may be identified as deriving from local special efforts." (emphasis added) Appendix to 49 C.F.R. 613.204; 41 Fed. Reg. 18234 (April 30, 1976)

c. The Defendants Have Intentionally Discriminated Against Plaintiffs in Violation of Section 504

The District Court below suggested that on the basis of the statutory language alone, section 504 was not violated unless the defendants had acted to affirmatively exclude the elderly or handicapped from public transportation, and that in this case there was no "impermissible exclusion." (Mem. Op. p. 9).

However, even if the District Court was correct in ruling that "intent" to discriminate must be shown where plaintiffs are relying on the statutory language of section 504 alone, plaintiffs argue that defendants have acted in such a way as to have "intentionally" discriminated against the plaintiffs.

From the decision of Monroe v. Pape, 365 U.S. 167, 187 (1961) the standard in establishing when a specific intent to discriminate exists, has been the "reasonable man standard" in which a man is made responsible for the natural consequences of his actions. This standard has never been overruled by the Supreme Court.^{77/}

In Justice Stevens' concurring opinion in Washington v. Davis, supra, at 2054 he elaborates on the majority's opinion to discuss the

77/ In Village of Arlington Heights v. Metropolitan Housing Development Corp., U.S. (1977) 45 U.S.L.W. 4073, 4077 the Supreme Court to a limited extent discusses what might be evidence susceptible of leading a court to the conclusion that intent to discriminate is present, and states that circumstantial and direct evidence must be inquired into. "The specific sequence of events leading up to the challenged decisionmakers' decision may also shed some light on the decisionmaker's purpose." The court adds at the end however, that its suggestions are not purported to be "exhaustive." At 4077.

burden of proof necessary to prove "intent" to discriminate, which parallels the statement in Monroe v. Pape, supra:

.. Frequently, the most probative evidence of
intent will be objective evidence of what
.. actually happened rather than evidence
describing the subjective state of mind of
the actor. For normally, the actor is
presumed to have intended the natural consequences as of his deeds.

The Second Circuit Court of Appeals also took this position in Hart v. Community School Board of Education New York School District, 512 F. 2d 37,50 (1975) in holding:

....[We] believe that a finding of de jure segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation.

In a case closer in facts to ours, the court in Bartels v. Biernat, supra, at 231, found that the state defendants by operating an effectively inaccessible mass transit system and by attempting to purchase new inaccessible buses "so as to knowingly exclude mobility handicapped persons," violated their rights under section 504 and that the federal defendants by approving the planned purchase with "full knowledge" that the services would be inaccessible have also violated plaintiffs' rights under section 504.

.. Plaintiffs here have cited in pages 33-36 of their brief
.. some of the "actions taken, coupled with omissions made" that we believe make it clear that the natural and foreseeable consequences of these actions have been the development of a system of transportation that discriminates against handicapped persons. Although plaintiffs had inadequate opportunity to do discovery to uncover further

evidence at the hearings on plaintiffs' Motion for a Preliminary Injunction it was revealed that, federal and state defendants were aware that the system was, and would continue to be inaccessible to the handicapped, (Exhibit M to Plaintiffs' Exhibit A p. 1); they were aware that this situation violated the law (Plaintiffs' Exhibit E p. 4-43; T. 147), they were aware of ways to make the system accessible (T. 121, 226, 228; Defendants' Exhibit 4A-H) but they had chosen not to do so for a variety of reasons, including their unsubstantiated assertion that it might slow up the system (T. 163, 235-237).

Plaintiffs believe that these facts, coupled with those plaintiffs would seek to obtain through discovery, demonstrate a deliberate pattern of conduct on the part of the defendants that should have led the court to the conclusion that the defendants had knowingly and intentionally excluded handicapped persons from the mass transportation system in the Hartford, New Haven and Stamford urban areas, in violation of their rights under section 504.

d. The District Court Erred in Failing to Order the Defendants to Take Appropriate Action to Remedy the Violation of Section 504.

Similar to the situation of plaintiffs in Lau, supra, (at 562, 563), plaintiffs here are not seeking a specific remedy from the court. Rather, plaintiffs ask only that the Connecticut Department of Transportation apply its expertise to the problem and rectify it so that the public bus transportation system in Connecticut is made effectively accessible to its handicapped citizens.

Once a right and a violation have been shown the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility, are inherent in equitable remedies Swan v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971).

The absence of regulations do not limit the scope of the remedies possible. In Bossier Parish, supra, the Fifth Circuit Court of Appeals upheld the District Court's order that defendants come up with a desegregation plan. 240 F. Supp. 709 (1965). In Lau, supra, the judgment of the lower court was reversed and the case remanded to the District Court "for the fashioning of appropriate relief" which by implication, necessitated court approval of a plan to be devised by the Board of Education to provide bilingual education for 1,800 Chinese-American children. Again, the plaintiffs here do not seek an order from this Court requiring every bus that defendants intend to purchase be made accessible through lift devices. However, plaintiffs do ask that defendants be charged with the responsibility for devising a plan, whether it involves the use of standard size buses and/or small mini-buses run in a dial-a-ride mode, that will result in the public bus transportation system being made effectively accessible to the mobility handicapped. In Bartels v. Biernat, supra, the court enjoined the defendants from taking any action to purchase any new buses:

until such time as defendants can demonstrate to the satisfaction of this Court that mass transportation facilities and services which can be effectively utilized by mobility handicapped individuals have been planned, designed and are being made available to such individuals in a non-discriminatory manner, at 233.

and retained jurisdiction of the case until all requirements of the Court and judgment were satisfied.

3. The District Court Erred In Concluding That Connecticut's Vague And Uncertain Efforts To Plan And Provide The Mobility Handicapped With Mass Transportation Was Consistent With 49 U.S.C. §1612(a)

a. §16(a) Requires Substantial and Meaningful Efforts to Provide Mass Transportation to the Mobility Handicapped

Section 16(a) of the Urban Mass Transportation Act provides that:

It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured, and that all federal programs offering assistance in the field of mass transportation...should contain provisions implementing this policy.

The Act defines "handicapped person" as an individual:

Who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, is unable without special facilities or special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected.^{79/}

By defining "handicapped person" in functional terms of ability to use mass transportation in relation to the design of transit facilities and equipment, Congress recognized that individuals affected by disabling conditions or the aging process, do possess

^{78/} 49 U.S.C. §1612(a)

^{79/} 49 U.S.C. §1612(d)

capabilities for mobility and independence and that the limitation on their ability to use mass transportation effectively arose from structural barriers in the facilities and equipment themselves.

.. To remedy this exclusion Congress mandated that mass transit facilities and services be planned and designed to accommodate the mobility handicapped to effect maximum use by this population.

The "special efforts" language of 42 U.S.C. §1612 (a) requires more than any effort relating to transportation concerns of the handicapped, but instead places recipients of federal funds under an obligation to take meaningful and substantial action to ensure that mass transportation services are effectively accessible to the mobility handicapped.

The remarks of Congressman Biaggi who sponsored section 16, are important in discerning its purpose:

The amendment would require all federally assisted mass transit facilities to meet the needs of the elderly and the handicapped...

The present designs of mass transit systems are such that some 44 million Americans will be excluded from using them. These Americans are elderly citizens, handicapped persons, cardiac patients, accident victims, and many others who are hindered in their movements by age or physical impairment.

Among these 44 million Americans are many veterans of World War II, the Korean conflict, and the Vietnam War who were permanently injured while aiding in the defense of this country. Yet, they return to this land and find public transportation systems impossible or nearly impossible to use.

Also included in these 44 million Americans are persons who as temporarily handicapped due to illness or other impairments. These may be persons with broken legs, arthritic sufferers, pregnant women or recent hospital patients...

Congress has authorized expenditures to remove barriers for the elderly and handicapped in other areas. Particularly, my colleague from Florida (Mr. Bennett) was instrumental in passing legislation that would require the removal of travel barriers from all federally funded buildings...

Thus my amendment would extend this existing policy to mass transportation systems that are federally supported so that such barriers to travel can be removed at the program's inception with very little if any additional costs.^{80/}

To further explain the purpose of the statute, Congressman Biaggi, cited a contemporaneous speech of President Richard M. Nixon urging similar action:

Isolated from regular contact with society, many of our handicapped citizens lead lives of lonely frustration .

Working together, on both public and private levels, we can and must insure full lives for them. Together, we can topple the environmental barriers which prevent the handicapped from entering building or using public transportation, we can welcome back the returning disabled veterans to a life of hope; and we can bring all of our handicapped fellow citizens into the mainstream of American life.^{81/}

Congressman Biaggi also expressed concern that UMTA funds not be used for unnecessarily separate transportation systems for the handicapped:

We are not talking about specialized programs or adding to the Federal Bureaucracy, we are simply talking about granting equal rights to a large segment of our population to use public facilities with the same ease as everyone else.

^{80/} 116 Cong. Rec. 34180 (1970); See also Congressman Matsunaga's remarks to the same effect at 116 Cong. Rec. 34181 (1970).

^{81/} Proclamation 4001, Weekly Compilation of Presidential Documents, September 14, 1970 at 1169, cited at 116 Cong. Rec. 34180 (1970).

Other proposals have been offered that would set up special transportation facilities for the elderly and handicapped. Others would provide subsidies so that these people could use more expensive services such as taxi cabs or limousines.

However, besides the factor of costs for these programs, they would further serve to segregate the elderly and handicapped from our society.^{82/}

Apart from the discussion of Section 16 by Congress, the legislative history of the 1970 Act shows that central to the Congressional purpose in establishing the general mass transportation grant program was to improve mass transportation for the handicapped. For example, John Volpe, then Secretary of Transportation, expressed the following concern:

There are two facets to the transportation problems confronting our cities today. First is the need to provide adequate transportation systems for the young, old, handicapped and the poor--in short, those who must rely on public transportation.^{83/}

Similarly, Congressman William Widnall, ranking minority member of the House Committee on Banking and Currency made the following statement concerning the purpose and significance of the Act:

Mr. Chairman, I am pleased to rise in support of H.R. 18185, the Urban Mass Transportation Assistance Act of 1970, which has been reported favorably and unanimously by the Banking and Currency Committee. A very similar bill, S. 3154, passed the Senate by the overwhelming margin of 84 to 4.

^{82/} 116 Cong. Rec. 34181 (1970).

^{83/} Hearings on H.R. 6663, S. 3154, H.R. 7006, H.R. 13403 and H.R. 16261 before the House Subcommittee on Housing of the Committee on Banking and Currency, 91st Congress, 2nd Session, at 105 (1970).

..
.. I think these actions, and the degree of unanimity with which they were undertaken are significant barometers of a sense of urgency, not only within this House and the other body, but in the hearts and minds of the public in every part of our Nation. The problems of mobility within our urban and metropolitan areas, not only for the affluent who can afford cars, but also for the poor, the young, the old and the physically handicapped, must be solved...now.84/

To the same effect are the comments of Congressman Henry Reuss:

While we have done our utmost for automobile owners and truckers, we have left the poor, the aged, and handicapped stranded in our urban centers--stranded by transit systems that if operative at all can take them neither safely nor speedily nor economically to the jobs and assistance they need.85/

49 U.S.C. 1612(a), taken together with the legislative history of the entire Act makes mandatory the taking of meaningful and substantial planning and design efforts by UMTA and by recipients of federal funds to make mass transportation systems effectively usable by the handicapped. Congress saw the absence of mass transportation to the handicapped as a substantial problem requiring prompt attention.

Nearly five years after the passage of the Act, UMTA promulgated planning regulations requiring that state and local planning efforts include special efforts.

..
.. 84/ 116 Cong. Rec. 34166 (1970).

.. 85/ 116 Cong. Rec. 34174 (1970); the legislative history of subsequent congressional enactments are also indicative of congressional intent. See S. Rep. No. 61, 93rd Cong., 1st Sess. 15 (1973); S. Conf. Rep. No. 355, 93rd Cong. 1st Sess. 87 (1973); 120 Cong. Rec. 5308-9 (1974); Hearings on S.662 before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess., at 28 (1975); and 120 Cong. Rec. 19851 (1975).

to plan public mass transportation that handicapped individuals can effectively use.^{86/} The regulations provide for joint Federal Highway Administration - UMTA review and certification of compliance with urban transportation planning processes.^{87/}

Almost seven months later UMTA passed "Additional criteria for Urban Mass Transportation Administrator's approvals under 23 C.F.R. 450.320".^{88/} These regulations make special efforts in planning to meet the transportation needs of handicapped persons, specifically including wheelchair users and those with semiambulatory capabilities, a precondition to federal approval of applications for mass transportation funds.^{89/}

Advisory information issued simultaneously, to be added to the appendix to 23 C.F.R. Part 450, subpart A, sets forth general guidance on the meaning of "special efforts" in planning:

The urban transportation planning process must include special efforts to plan mass transportation facilities and services that can effectively be utilized by elderly and handicapped persons. As used in this guidance, the term special efforts refers both to service for elderly and handicapped persons in general and specifically to service for wheelchair and semiambulatory persons.

With regard to transportation for wheelchair users and others who cannot negotiate steps, special efforts in planning means genuine, good-faith progress in planning service for wheelchair users and semiambulatory handicapped persons that is reasonable by comparison with the

^{86/} See 23 C.F.R. 450.120 (a)(5)(effective October 17, 1975)
49 C.F.R. 613.100 (effective October 17, 1975)

^{87/} 23 C.F.R. 450.122 and 49 C.F.R. 613.100(effective October 17, 1975)

^{88/} 49 C.F.R. 613.204 (May 31, 1976).

^{89/} Ibid.

service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period. (emphasis added).

Further advisory information published as an appendix to 49 C.F.R. Part 613, subpart B, gives several examples of a level of effort that will be deemed to satisfy the "special efforts" requirement.^{90/} As the court in Lloyd v The Regional Transportation Authority, supra, points out:

While the guidelines do not purport to be regulatory standards or minimums, they do suggest a commitment to an affirmative remedial program of substantial scope.^{91/}

The court below held that section 16(a) evidences a congressional intention that "special efforts" be taken to create urban mass transportation systems which handicapped persons can effectively use. The court indicated that judicial intervention might be warranted if plaintiff had demonstrated that the defendants had done nothing or if their actions fell below any defined standard of minimum performance. The court found that plaintiffs' failed to make any such showing and that CDOT's "good faith" efforts set forth in footnote 10 of the court's opinion constituted compliance with §16(a). The court did not inquire as to whether the particular state actions referred to in footnote ten constituted meaningful

^{90/} 41 F.R. 18234 (April 30, 1976).

^{91/} Lloyd v. The Regional Transportation Authority, supra, at p. 1283 See also Decision of Brock Adams, Secretary of Transportation to Mandate TRANSBUS, (May 19, 1977) interpreting 49 U.S.C. §1612 (a) as requiring that all standard sized buses purchased with federal financial assistance after September 30, 1979 be accessible to wheelchair users.

improvements in a mass transportation system from which the handicapped had long been excluded, whether concrete plans have been established by CDOT to eventually provide low cost reliable mass transportation to the handicapped, whether restrictions on 16(b)(2) van use or other services referred to in the footnote were evaluated in reaching its decision or whether entirely separate services for the handicapped of substantially smaller scope are permissible under the Act.

As previously mentioned, defendants conceded at the preliminary injunction hearing that no plans requiring any state or local efforts to meet the mass transportation needs of the handicapped existed for either the Stamford or New Haven urbanized areas, nor were any such plans presented to the court even though no decision was rendered until December 17, 1976 (T. 242, 248, 306)^{92/}. In addition, defendants offered no proof to contradict the testimony of the plaintiffs witnesses that no low cost reliable public transportation is readily available to handicapped individuals in the New Haven or Stamford urbanized areas (T. 81, 207, 82, 214)^{93/}. In these circumstances defendants "special efforts" if any, in planning and design of mass transportation facilities and services in the Stamford and

^{92/} We would again point out that the court apparently misinterpreted CDOT's settlement offer appearing in several different places in the transcript (c.f.T. 227-235, 248-251, 261-273, 297-302) as a concrete state plan. The offer called for deletion of two standard size buses from the upcoming purchase and using the resulting federal and state funds to institute a wheelchair accessible ten van regular route system in New Haven, Conn. The offer, however, was clearly put together hastily without meaningful forthought and was developed only to settle pending litigation (T. 248, 262, 297-302).

^{93/} As discussed at pp 26, 27, supra, CDOT's participation in the 16(b)(2) (49 U.S.C. §1612(b)(2)) program will not provide low cost reliable mass transportation for the general handicapped

(continued next page)

New Haven urbanized areas are limited to defendants' assurances referred to in footnote 5 of the court's opinion. Those assurances are that the 280 standard sized buses CDOT intends to purchase with state and federal funds must contain certain cosmetic changes enumerated at 49 C.F.R. part 409^{94/} including priority seating signs, handrails and stanchions, non-skid floors, and step surfaces, and improved interior lighting.^{95/} Although the regulations require manufacturers to make available wheelchair accessible buses, the regulations leave CDOT with the decision as to whether accessible or inaccessible buses should be ordered.^{96/} It is important to note then that none

93/ (continued from previous page) public. Use of 16(b)(2) vehicles will be restricted to agency use and will serve only agency clientele (T. 84, 85, 199, 200). Defendants offered no evidence tending to contradict these sworn statements of plaintiffs' witnesses. UMTA has already authoritatively determined that under such conditions, expenditures under the 16(b)(2) program cannot be considered "special efforts" under 49 U.S.C. 1612(a). At 41 F.R. 18234 (April 30, 1976) the UMTA guidelines state:

Projects funded by UMTA under 16(b)(2) (49 U.S.C. §1612(b)(2)) may be identified as deriving from local special efforts to meet the needs of wheelchair users and semiambulatory persons only to the extent that the following four conditions are met...(3) the service is not restricted to a particularized organizational or institutional clientele,...Id.

94/ See 41 Fed. Reg. 18240 (April 30, 1976), 41 Fed. Reg. 45842 (October 18, 1976) and 42 Fed. Reg. 9655 (February 16, 1977).

95/ See Young v. Coleman, supra, p. 4.

96/ See 49 C.F.R. 609.15(b); and testimony below indicating that CDOT makes all essential decisions regarding standard size bus design (T. 346).

of the special design features required by UMTA regulations which will be included in CDOT's new bus fleet in the Hartford, New Haven or Stamford urbanized areas will be effectively usable by persons with mobility handicaps.

The terms of 49 U.S.C. §1612(a), together with the legislative history outlined above clearly indicate that handicapped individuals should have more than the meaningless opportunity to try to board an inaccessible bus. Congress declared that handicapped have the same right as the rest of the public to use mass transportation vehicles knowing full well that insurmountable bus steps rather than ordinances or posted signs were effectively prohibiting handicapped individuals from using public transportation systems. By requiring the availability of mass transit services which could be effectively utilized by handicapped individuals, Congress was clearly requiring that accessible vehicles must be provided as part of that system.

CDOT, on the other hand, while being well aware that the mass transportation systems that CDOT operates in Hartford, Stamford and New Haven urbanized areas do not serve handicapped individuals (Exhibit M of Plaintiffs' Exhibit A), that no low cost public transportation is currently available for the handicapped in these urbanized areas (T. 81, 207, 82, 214), that no plans exist for developing a mass transportation system that serve the handicapped (T. 242, 248, 306), is about to purchase with UMTA approval 280 inaccessible replacement standard size vehicles from which the handicapped will derive no benefit. Certainly CDOT's action and UMTA's knowing acquiescence is inconsistent with 49 U.S.C. 1612(a).

The terms of 49 U.S.C. 1612(a) together with the relevant legislative history indicate that Congress contemplated substantial and meaningful efforts to provide mass transportation to the handicapped by recipients of federal mass transportation funds. The assertion of the law is buttressed by UMTA's own authoritative interpretation of the 49 U.S.C. 1612(a) "special efforts" requirement:

planning service for wheelchair users and semiambulatory handicapped persons that is reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable period of time. 97/

The court below, however, applied a different and less restrictive test relying principally upon Snowden v. Birmingham-Jefferson County Transit Authority, supra,^{98/} as defined in footnote 10 of the court's opinion was all that the law required. The court did not evaluate the state defendants' present and proposed efforts to improve mass transportation to serve the handicapped in terms of the nature and extent of the proposed services, or to determine whether the

97/ 23 C.F.R. part 450, appendix, subpart A. See also Decision of Brock Adams, supra, interpreting 49 U.S.C. §1612(a) as requiring accessibility of all buses purchased with federal financial assistance after September 30, 1979, and that in the interim, mass transportation systems must meet the needs of the handicapped.

98/ In Snowden, plaintiffs sought to stop delivery of 22 inaccessible manufactured standard sized buses which were about to be delivered. The court granted defendants' summary judgment motion because no manufacturer in the United States produced an accessible standard sized bus. Snowden is distinguishable from the case at bar because: (1) technological barriers clearly no longer exist to purchasing accessible standard sized buses, (2) plaintiffs here do not seek to make all or even any standard sized vehicles accessible so long as the mass transportation system is made effectively accessible with smaller accessible vehicles plaintiffs have shown are available and (3) we are not here concerned with the purchase of a small number of vehicles as was the Snowden court, but with vehicles to replace nearly the entire public bus fleet in the Hartford, Stamford and New Haven urbanized areas.

defendants' efforts were reasonable in light of mass transportation provided the rest of the general public in the relevant urbanized areas. Instead the court lists programs that were mentioned during the short duration of the litigation below, without discussing whether there will be a real improvement in transportation services available for the handicapped in the foreseeable future. For example, CDOT's only undisputed effort to extend transportation services to the handicapped in the urbanized areas touched by this litigation is its participation in the 10(b)(2) program.^{99/} With respect to the 16(b)(2) program, the court stated:

These vans will provide at least some transport for those in wheelchair.^{100/}

With regard to the Stamford and New Haven urbanized areas, the Courts holding that this 16(b)(2) program participation, regardless of the level of reliable low-cost transportation that will result constitutes compliance with 49 U.S.C. 1612(a), appears to mean that any effort, regardless of how vague or uncertain it might be, is sufficient.

Local municipalities have advanced tentative proposals to provide some emergency transportation services for the handicapped (T. 129, 348 -352) in the Hartford area. No state funding is involved in this program (T. 349). Local towns and municipalities developed this plan out of desperation because no state money has been made available to transport the handicapped (T. 349, 350). The program was intended to serve emergency transportation needs of the handicapped in some towns (T. 350, 351). It was not intended as a regional

^{99/} See pp27-30supra, for comments relating to other state "special efforts" enumerated in footnote 10.

^{100/} Young v. Adams, supra, footnote 10.

transportation system for handicapped as outlined in the Transit Development Plan for the Capitol Region (Plaintiffs' Exhibit E, pp. 6-8 to ,6-18; T. 340, 341, 342, 343- 349). The proposed system also .. if established will be inadequate because towns that provide local .. match money are unwilling to transport citizens of other towns and/or to transport its own handicapped citizens into other towns (T. 351, 385, 386). The proposed system will, if initiated, be difficult to coordinate and will not meet the transportation needs of those handicapped individuals who wish to work (T. 351). Town funding of such transportation systems for the handicapped is always tenuous leaving the future of any such project in doubt (T. 384.).

In the final analysis, then, the possibility of obtaining low cost reliable mass transportation services for the handicapped in the Hartford urbanized area is no more certain than in the New Haven and Stamford urbanized areas. Certainly, to conclude as the court below apparently has done, that such a program alone or taken in conjunction with 16(b)(2) services constitutes compliance with 49 U.S.C. 1612(a), means that any program, regardless of the level of services that will be achieved by its implementation, is sufficient. The court erred in concluding that the planning of separate specialized restrictive transportation services for the handicapped that will be .. insubstantial in comparison with the well-coordinated, reliable, .. regionwide mass transportation services available to the rest of the general public constituted compliance with 49 U.S.C. 1612(a).

4. The District Court Erred Holding that the Defendants
Had Not Violated The Plaintiffs' Rights to Equal
Protection of the Laws Under the Fifth and Fourteenth
Amendments to the United States Constitution

The actions of the state and federal defendants in creating and perpetuating a transportation system in the State of Connecticut that is inaccessible to handicapped persons are violative of the rights of the plaintiffs to equal protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitution.^{101/}

Said actions have resulted in the creation of two classes of persons, the first, being the ambulatory public who are able to mount the steps and thus use the public transportation system in the Hartford, New Haven and Stamford urban areas, and the second, being the non-ambulatory handicapped public, who because of the bus steps, and the failure of the defendants to either make the buses accessible and/or

^{101/} "While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' Schneider v. Rusk, 377 U.S. 163, 168 (1964)..."U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 533 n.5 (1975), Bolling v. Sharpe, 347 U.S. 497 (1954) The test under the Fifth Amendment is similar if not identical to that under traditional equal protection analysis. U.S. Department of Agriculture v. Moreno, supra.

develop an alternate system, are unable to use the public transportation system.

.. There is no question but that recent Supreme Court pronouncements
.. in cases dealing with equal protection, have altered the old, rigid two-tier test that used to be applied in determining if a violation of the equal protection clause had occurred. Under one standard, if the classification discriminated against a "suspect class" such as one based on race, or nationality^{102/} or affected a "fundamental right" such as the right to travel^{103/} then in order for the classification to be validated, a "compelling state interest" must be shown.^{104/} Under the other standard, where the classification created involved neither a "fundamental right" or a "suspect class", then the statute or action taken must be shown to bear some rational relationship to legitimate state purposes.^{105/}

In recent years however, the rigid analyses have given way to a more fluid approach particularly where important individual interests are concerned which may have constitutional implications^{106/} or where the classification involves particularly disadvantaged or powerless groups.^{107/}

.. 102/ See Loving v. Virginia, 388 U.S. 1, 9 (1966).

.. 103/ See Shapiro v. Thompson, 394 U.S. 618 (1969).

104/ Ibid.

105/ See generally, San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

106/ See Eisenstadt v. Baird, 405 U.S. 438 (1972).

107/ See Reed v. Reed, 404 U.S. 71 (1971) and Mathews v. Lucas, 427 U.S. 495 (1976).

Recognition that the Court is in reality examining the constitutional and societal importance of the interests affected and the position in society of those affected, comes in the dissenting and concurring opinions offered by the various justices in different cases,^{108/} and indicates that while the two tier approach may still be articulated in opinions, it is in reality a "method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."^{109/}

Thus plaintiffs would urge that the Court evaluate their claim that the defendants' have unconstitutionally excluded them from the public transportation system of the State of Connecticut not in terms of a rigid analysis of what category into which their claim fits, but in terms of an examination of the importance of the interest the seriousness of its effect upon them, and the status in society of the class of people affected by the defendants' actions.

There is no question that freedom to travel is a "fundamental right" protected by the United States Constitution. Shapiro v. Thompson, supra. Back in the year 1900, the Court stated:

^{108/} See Justice Marshalls' dissenting opinion in Dandridge v. Williams, 397 U.S. 471, 519-521 (1970), and San Antonio School District v. Rodriguez, supra, at 99, Justice Powell's concurring opinion in Craig v. Boren, U.S. , 45 U.S.L.W. 4057, 4063 (1977); Justice Stevens' concurring opinion in Craig v. Boren, supra.

^{109/} Justice Stevens, Craig v. Boren, supra.

Undoubtedly the right to move from one place to another according to inclination is an attribute of personal liberty, and the right, ordinarily, of free transit from and through the territory through any state is a right secured by the Fourteenth Amendment and other provisions of the Constitution. Williams v. Fears, 179 U.S. 270, 274 (1900).

And while the Supreme Court has not ruled that "intrastate" travel is a fundamental right as well, there is no question, but that the deprivation of a means to travel within the state will very heavily intrude on the exercise of other firmly established fundamental rights, including the right to vote.^{110/} Further, the deprivation by the defendants of the plaintiffs' right to travel is an "absolute" deprivation. The Supreme Court has always examined a classification more closely where there is a total deprivation of an opportunity to enjoy a benefit,^{111/} and where the government, as here, has a monopoly on the sought after benefit.^{112/}

In San Antonio School District v. Rodriguez, supra, the Court spoke of the indicia that made a class of persons subject to a discrimination suspect; that is, whether the class is saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection, at 28.

^{110/} Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

^{111/} See Griffin v. Illinois, 351 U.S. 12 (1956) as distinguished from Sosna v. Iowa, 419 U.S. 393 (1975).

^{112/} See Boddie v. Connecticut, 401 U.S. 371 (1971).

There is no question that handicapped people as a class have long been subject to a pattern of purposeful, unequal treatment in this society, particularly because they are politically weak and fragmented.^{113/} It is true that in Frontiero v. Richardson, 411 U.S. 677, 686 (1973) the court distinguished between discrimination on the basis of sex from that on the basis of disability, describing it as a non-suspect status. However, in stating that physical disability, like intelligence was not suspect, plaintiffs would argue that the court meant that where the physical disability related in some way to the ability to perform the job (using again the example of the blind bus driver), there is no question that a classification of this sort is not suspect. But where the classification, bears no relationship to the handicapped person's ability to perform or contribute in that sphere, then like such other characteristics as race, nationality, sex and illegitimacy, the classification must be examined, to differing degrees, with a jaundiced eye, since where there is no connection between the classification and the ability to perform, the logical explanation for imposing a burden in such case, can only be that the indicated group is designated as intrinsically inferior to other groups regardless of what they might do or have done.^{114/}

113/ See Krieger, Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro, 38 American Scholar 412 (1969).

114/ See, Developments in the Law-Equal Protection, 82 Harv. L. Rev. 1065, 1173-1174 (1969) cited by the Court in Frontiero v. Richardson, *supra*, footnote 18.

The plaintiffs thus argue, that in this case, where they possess the same qualifications for, and necessities to ride the public bus system in the State of Connecticut, as the rest of the ambulatory public, the actions of the state and the federal government in denying them this right must be examined with a more critical eye than is usually applied under the "rational basis" test, with the actions subject to an inquiry similar to that employed, where discriminations on the basis of sex or illegitimacy occur.

Thus under this standard, the actions of the defendants cannot be validated unless the classification created, serves important governmental objectives and is substantially related to the achievement of said objectives. Craig v. Boren, supra at 4060.

The Urban Mass Transportation Act, 49 U.S.C. 1601 et. seq. was enacted to assist local government in developing, maintaining and improving mass transportation facilities and services, recognizing the need of all citizens to move quickly and at a reasonable cost. 49 U.S.C. §1601-1601(b). As discussed at pages 61-65 of our brief, legislative history of the Act itself, and of section 1612, indicates that the expansion of transportation services to include the handicapped was an important priority. In the State of Connecticut's application for financial assistance, (Plaintiffs' Exhibit A) under exhibit C entitled, "Project Justification," the State's purpose in applying for federal funds to purchase the Connecticut Company and purchase new buses, was to:

... improve the quality and quantity of transit so that ridership may be expanded at reasonable cost.

None of these stated legitimate goals will be furthered by the purchase of new standard-size inaccessible buses. On the contrary, there is no question that the purchase of accessible buses will expand the number of persons who will be able to use the service, and thus will serve the goal of increasing ridership. Further, the knowing concurrence by the federal defendants in a project to purchase inaccessible buses, clearly conflicts with the goals expressed in the UMTA Act and in the legislative history, of soon providing transportation for all its citizens; these inaccessible buses, if purchase, will have a life span of about fifteen years. (T. 8).

In the District Court's Opinion, dismissing plaintiffs' claim that the defendants' actions had violated plaintiffs' constitutional rights, (Memo. Op. at pp. 11, 12) the Court found that the defendants' actions were not arbitrary or unreasonable in light of the cost and inefficiency involved in equipping buses with lift devices, holding, in effect, that the purchase of inaccessible buses rationally furthered these two legitimate governmental interests.

However, "the Constitution recognizes higher values than speed and efficiency." Stanley v. Illinois, 405 U.S. 645, 656, (1972).

In James v. Strange, 407 U.S. 128 (1971), where the court threw out a statute that was justified by the State on financial grounds, the court said at 141-142

State recoupment laws, notwithstanding the state interest they serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect.

Further, the question as to whether or not equipping buses with lift devices would necessarily result in a more inefficient service was clearly an issue that was in dispute. Defendants' own witness testified that no experiments had been done to test it out, and that schedules could probably be adjusted accordingly to handle any delays. (T. 163, 237-238, , 302-303).

As to the question of cost, due to the only recent availability of lift devices for standard-size buses, testimony at trial was in dispute as to the ultimate costs involved in making the system accessible. Further, since the State Defendants had done no studies to determine the number of accessible vehicles necessary to make the system effectively accessible, they should be foreclosed from claiming the cost excessive.

Thus even if the District Court, correctly found that the "rational basis" test was applicable to plaintiffs' claim, plaintiffs argue that the defendants' failure to plan for, and make the bus system effectively accessible does not further any legitimate, articulated goals, and although there may conceivably be state interests to be advanced by their actions, the Court has the power not to accept these interests on face value, but may and should test them by independent analyses. Eisenstadt v. Baird, supra.

Plaintiffs thus believe that the actions of the defendants, in intentionally^{115/} establishing and maintaining a public transportation

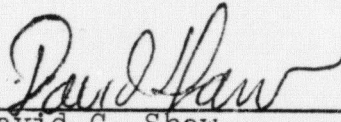
^{115/} See pages 32-36
v. Davis, supra.

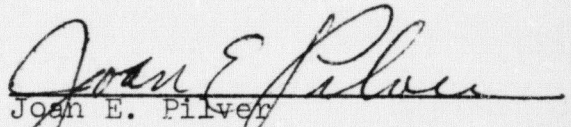
of plaintiffs' brief and Washington

system that mobility handicapped persons cannot use, have violated their rights to equal protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitutions.

CONCLUSION

The record in this case demonstrates that defendants' Motion to Dismiss and/or for Summary Judgment was improvidently granted in light of the complex, material issues of fact in dispute in this case, and in light of the mandate of 49 U.S.C. §1612(a) and 29 U.S.C. §794, measured against which, the defendants' action fall short. For these and the reasons stated above, it is respectfully submitted that the District Court decision should be vacated and remanded for trial or reversed.


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S T A T U T O R Y

A D D E N D U M

RELEVANT SECTIONS OF THE REHABILITATION ACT
OF 1973, (29 U.S.C. § 701 ET. SEQ.) PROVIDE IN PERTINENT PART:

29 § 706

(6) The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

29 § 792

*Additional functions: transportation barriers and housing needs;
transportation and housing plans and proposals*

(c) The Board shall also (1)(A) determine how and to what extent transportation barriers impede the mobility of handicapped individuals and aged handicapped individuals and consider ways in which travel expenses in connection with transportation to and from work for handicapped individuals can be met or subsidized when such individuals are unable to use mass transit systems or need special equipment in private transportation, and (B) consider the housing needs of handicapped individuals; (2) determine what measures are being taken, especially by public and other nonprofit agencies and groups having an interest in and a capacity to deal with such problems, (A) to eliminate barriers from public transportation systems (including vehicles used in such systems), and to prevent their incorporation in new or expanded transportation systems and (B) to make housing available and accessible to handicapped individuals or to meet sheltered housing needs; and (3) prepare plans and proposals for such further actions as may be necessary to the goals of adequate transportation and housing for handicapped individuals, including proposals for bringing together in a cooperative effort, agencies, organizations, and groups already working toward such goals or whose cooperation is essential to effective and comprehensive action.

29 § 794. Nondiscrimination under Federal grants

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub.L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394.

RELEVANT SECTIONS OF THE URBAN MASS TRANSPORTATION ACT

(49 U S C. 1601. ET SEQ.) PROVIDE IN PERTINENT PART:

49 § 1602. Federal financial assistance

Grants or loans to States and local public agencies; uses of funds; eligible facilities and equipment; eligibility of applicant; real property acquisition; prohibitions on uses of grant or loan funds; development of plans and programs of transportation systems for urbanized areas; scope and implementation of projects; cutoff date for approval of projects

(a)(1) The Secretary is authorized, in accordance with the provisions of this chapter and on such terms and conditions as he may prescribe, to make grants or loans (directly, through the purchase of securities or equipment trust certificates, or otherwise) to assist States and local public bodies and agencies thereof in financing (1) the acquisition, construction, reconstruction, and improvement of facilities and equipment for use, by operation or lease or otherwise, in mass transportation service in urban areas and in coordinating such service with highway and other transportation in such areas, and (2) the establishment and organization of public or quasi-public transit corridor development corporations or entities. Eligible facilities and equipment may include personal property including buses and other rolling stock and real property including land (but not public highways), within the entire zone affected by the construction and operation of transit improvements, including stations, needed for an efficient and coordinated mass transportation system which is compatible with socially, economically, and environmental sound patterns of land use. No grant or loan shall be provided under this section unless the Secretary determines that the applicant has or will have

(A) the legal, financial, and technical capacity to carry out the proposed project; and

(B) satisfactory continuing control, through operation or lease or otherwise, over the use of the facilities and equipment.

The Secretary may make loans for real property acquisition pursuant to subsection (b) of this section upon a determination, which shall be in lieu of the preceding determinations, that the real property is reasonably expected to be required in connection with a mass transportation system and that it will be used for that purpose within a reasonable period. No grant or loan funds shall be used for payment of ordinary governmental or nonprofit operating expenses, nor shall any grant or loan funds be used to support procurements utilizing exclusionary or discriminatory specifications.

(2) It is declared to be in the national interest to encourage and promote the development of transportation systems, embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective the Secretary shall cooperate with the States in the development of long-range plans and programs which are properly coordinated with plans for improvements in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population. The development of projects in urbanized areas under this section shall be based upon a continuing, cooperative, and comprehensive planning process covering all modes of surface transportation and carried on by the States and the governing bodies of local communities in accordance with this paragraph. The Secretary shall not approve any project in an urbanized area after July 1, 1976, under this section unless he finds that such project is based on a continuing comprehensive transportation planning process carried on in conformance with the objectives stated in this paragraph.

§ 1603. Long-range program

Terms and conditions; planning requirements; "net project costs" defined; Federal grant for two-thirds and non-Federal funds for one-third of net project cost; refunds

(a) No Federal financial assistance shall be provided pursuant to subsection (a) of section 1602 of this title unless the Secretary determines that the facilities and equipment for which the assistance is sought are needed for carrying out a program, meeting criteria established by him, for a unified or officially coordinated urban transportation system as a part of the comprehensively planned development of the urban area, and are necessary for the sound, economic, and desirable development of such area. Such program shall encourage to the maximum extent feasible the participation of private enterprise. Where facilities and equipment are to be acquired which are already being used in mass transportation service in the urban area, the program must provide that they shall be so improved (through modernization, extension, addition, or otherwise) that they will better serve the transportation needs of the area. The Secretary, on the basis of engineering studies, studies of economic feasibility, and data showing the nature and extent of expected utilization of the facilities and equipment, shall estimate what portion of the cost of a project to be assisted under section 1602 of this title cannot be reasonably financed from revenues—which portion shall hereinafter be called "net project cost". The Federal grant for any such project to be assisted under section 1602 of this title shall be in an amount equal to 80 per centum of the net project cost. The remainder of the net project cost shall be provided, in cash, from sources other than Federal funds. Such remainder may be provided in whole or in part from other than public sources and any public or private transit system funds so provided shall be solely from undistributed cash surpluses, replacement or depreciation funds or reserves available in cash, or new capital. No refund or reduction of the remainder of the net project cost shall be made at any time unless there is at the same time a refund of a proportional amount of the Federal grant.

§ 1604. Urban mass transit grant program

Definitions

(a) As used in this section—

(1) the term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the acquisition, construction, or reconstruction of facilities and equipment for use in mass transportation, including designing, engineering, locating, surveying, mapping, acquisition of rights-of-way, relocation assistance, and acquisition and replacement of housing sites;

(2) the term "Governor" means the Governor, or his designate, of any one of the fifty States or of Puerto Rico, and the Mayor of the District of Columbia; and

(3) the term "urbanized area" means an area so designated by the Bureau of the Census, within boundaries which shall be fixed by responsible State and local officials in cooperation with each other, subject to approval by the Secretary, and which shall at a minimum, in the case of any such area, encompass the entire urbanized area within the State as designated by the Bureau of the Census.

Apportionment of funds; formula; density of population factor; designated recipient of apportioned funds to receive and dispense funds; availability of funds not expended by designated recipients

(b)(1) The Secretary shall apportion for expenditure in fiscal years 1975 through 1980 the sums authorized by subsection (c) of this section. Such sums shall be made available for expenditure in urbanized areas or parts thereof on the basis of a formula under which urbanized areas or part thereof will be entitled to receive an amount equal to the sum of —

(A) one-half of the total amount so apportioned multiplied by the ratio which the population of such urbanized area or part thereof, as designated by the Bureau of the Census, bears to the total population of all the urbanized areas in all the States as shown by the latest available Federal census; and

(B) one-half of the total amount so apportioned multiplied by a ratio for that urbanized area determined on the basis of population weighted by a factor of density, as determined by the Secretary.

As used in the preceding sentence, the term "density" means the number of inhabitants per square mile.

(2) The Governor, responsible local officials and publicly-owned operators of mass transportation services, in accordance with the procedures required under subsection (g)(1) of this section with the concurrence of the Secretary, shall designate a recipient to receive and dispense the funds apportioned under paragraph (1) that are attributable to urbanized areas of two hundred thousand or more population. In any case in which a statewide or regional agency or instrumentality is responsible under State laws for the financing, construction and operation, directly, by lease, contract, or otherwise, of public transportation services, such agency or instrumentality shall be the recipient to receive and dispense such funds. The term "designated recipient" as used in this chapter shall refer to the recipient selected according to the procedures required by this paragraph.

49 § 1604

(d)(1) The Secretary may approve as a project under this section, on such terms and conditions as he may prescribe, (A) the acquisition, construction, and improvement of facilities and equipment for use, by operation or lease or otherwise, in mass transportation service, and (B) the payment of operating expenses to improve or to continue such service by operation, lease, contract, or otherwise.

(2) The Secretary shall issue such regulations as he deems necessary to administer this subsection and subsection (e) of this section, including regulations regarding maintenance of effort by States, local governments, and local public bodies, the appropriate definition of operating expenses, and requirements for improving the efficiency of transit services.

Limitation on amount of grants for construction and operating expense projects; source of remainder of funds for projects

(e) The Federal grant for any construction project under this section shall not exceed 80 per centum of the cost of the construction project, as determined under section 1603(a) of this title. The Federal grant for any project for the payment of subsidies for operating expenses shall not exceed 50 per centum of the cost of such operating expense project. The remainder shall be provided in cash, from sources other than Federal funds or revenues from the operation of public mass transportation systems. Any public or private transit system funds so provided shall be solely from undistributed cash surpluses, replacement or depreciation funds or reserves available in cash, or new capital.

Federal funds available for expenditure for projects supplementary to average amount of State and local government funds, etc., expended for operations; State and local tax revenues expended for operations credited to non-Federal share of project costs

(f) Federal funds available for expenditure for mass transportation projects under this section shall be supplementary to and not in substitution for the average amount of State and local government funds and other transit revenues such as advertising concessions, and property leases, expended on the operation of mass transportation service in the area involved for the two fiscal years preceding the fiscal year for which the funds are made available; but nothing in this sentence shall be construed as preventing State or local tax revenues which are used for the operation of mass transportation service in the area involved from being credited (to the extent necessary) toward the non-Federal share of the cost of the project for purposes of the preceding sentence.

49 § 1604

(g)(1) It is declared to be in the national interest to encourage and promote the development of transportation systems, embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective the Secretary shall cooperate with the States in the development of long-range plans and programs which are properly coordinated with plans for improvement in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population. The development of projects in urbanized areas under this section shall be based upon a continuing, cooperative, and comprehensive planning process covering all modes of surface transportation and carried on by the States and the governing bodies of local communities in accordance with this paragraph. The Secretary shall not approve any project in an urbanized area after July 1, 1976, under this section unless he finds that such project is based on a continuing comprehensive transportation planning process carried on in conformance with the objectives stated in this paragraph.

(2) The Governor or designated recipient shall submit to the Secretary for his approval a program of projects for utilization of the funds authorized, which shall be based on the continuing comprehensive planning process of paragraph (1). The Secretary shall act upon programs submitted to him as soon as practicable, and he may approve a program in whole or in part.

(3) An applicant for assistance under this section (other than a Governor) shall submit the program or programs to the Governor of the State affected, concurrently with submission to the Secretary. If within thirty days thereafter the Governor submits comments to the Secretary, the Secretary shall consider such comments before taking final action on the program or programs.

(l) The Secretary shall not approve any project under this section unless he finds that such project is needed to carry out a program, meeting criteria established by him, for a unified or officially coordinated urban transportation system as a part of the comprehensively planned development of the urban area, and is necessary for the sound, economic, and desirable development of such area, and that the applicant or responsible agency has the legal, financial, and technical capacity to carry out the proposed project. A project under this section may not be undertaken unless the responsible public officials of the urbanized area in which the project is located have been consulted and, except for projects solely to pay subsidies for operating expenses,

(m) The Secretary shall not approve any project under this section unless the applicant agrees and gives satisfactory assurances, in such manner and form as may be required by the Secretary and in accordance with such terms and conditions as the Secretary may prescribe, that the rates charged elderly and handicapped persons during non-peak hours for transportation utilizing or involving the facilities and equipment of the project financed with assistance under this section will not exceed one-half of the rates generally applicable to other persons at peak hours, whether the operation of such facilities and equipment is by the applicant or is by another entity under lease or otherwise.

§ 1612. Planning and design of mass transportation facilities to meet special needs of elderly and handicapped

Congressional declaration of policy

(a) It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions implementing this policy.

Grants and loans for special projects to meet needs of elderly and handicapped persons

(b) In addition to the grants and loans otherwise provided for under this chapter, the Secretary is authorized to make grants and loans—

(1) to States and local public bodies and agencies thereof for the specific purpose of assisting them in providing mass transportation services which are planned, designed, and carried out so as to meet the special needs of elderly and handicapped persons, with such grants and loans being subject to all of the terms, conditions, requirements, and provisions applicable to grants and loans made under section 1602(a) of this title and being considered for the purposes of all other laws to have been made under such section; and

(2) to private nonprofit corporations and associations for the specific purpose of assisting them in providing transportation services meeting the special needs of elderly and handicapped persons for whom mass transportation services planned, designed, and carried out under paragraph (1) are unavailable, insufficient, or inappropriate, with such grants and loans being subject to such terms, conditions, requirements, and provisions (similar insofar as may be appropriate to those applicable to grants and loans under paragraph (1)) as the Secretary may determine to be necessary or appropriate for purposes of this paragraph.

Of the total amount of the obligations which the Secretary is authorized to incur on behalf of the United States under the first sentence of section 1603(c) of this title, 2 per centum may be set aside and used exclusively to finance the programs and activities authorized by this subsection (including administrative costs).

Financing of research, development and demonstration projects

(c) Of any amounts made available to finance research, development, and demonstration projects under section 1605 of this title after October 15, 1970, 1½ per centum may be set aside and used exclusively to increase the information and technology which is available to provide improved transportation facilities and services planned and designed to meet the special needs of elderly and handicapped persons.

Definition

(d) For purposes of this chapter, the term "handicapped person" means any individual who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, is unable without special facilities or special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected.

Title 49—Transportation

CHAPTER VI—URBAN MASS TRANSPORTATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 613—PLANNING ASSISTANCE AND STANDARDS

Urban Transportation Programming for Elderly and Handicapped Persons

The purpose of this document is to issue a final regulation which states additional criteria for the Urban Mass Transportation Administrator's project approvals under 23 CFR 450.320 and to issue advisory information on that regulation.

Also being issued today are the Urban Mass Transportation Administrator's elderly and handicapped regulations (41 FR 18236) and a joint UMTA-Federal Highway Administration issuance providing advisory information on urban transportation planning for elderly and handicapped persons (41 FR 18236). Since the programming regulation and advisory information being issued by this document have a close relationship to the joint UMTA-FHWA issuance described above, the preamble to the latter material, published at page 18235 of this edition of the FEDERAL REGISTER, is incorporated into this preamble.

In consideration of the foregoing and under the authority of section 16 of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1612), section 165 (b) of the Federal-Aid Highway Act of 1973, as amended (23 U.S.C. 142 nt.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and delegation of authority by the Secretary of Transportation at 49 CFR 1.51, chapter VI of the Code of Federal Regulations is hereby amended by adding a new section as set forth below, and the advisory information also set forth below is added to 49 CFR Part 613, Subpart B, as an appendix.

Effective Date: This regulation and advisory information are effective on May 31, 1976.

Issued on April 27, 1976.

ROBERT E. PATRICELLI,
Urban Mass Transportation
Administrator.

Section 613.204 and an appendix to 49 CFR Part 613, Subpart B, are added as set forth below:

§ 613.204 Additional criteria for Urban Mass Transportation Administrator's approvals under 23 CFR 450.320.

The Urban Mass Transportation Administrator will grant project approvals pursuant to 23 CFR 450.320(a) (3) only if:

(a) The urban transportation planning process exhibits satisfactory special efforts in planning public mass transportation facilities and services that can be utilized by elderly and handicapped persons; and

(b) The annual element of the transportation improvement program de-

veloped pursuant to 23 CFR 450.118 and submitted after September 30, 1976, contains projects or project elements designed to benefit elderly and handicapped persons, specifically including wheelchair users and those with semiambulatory capabilities; and

(c) After September 30, 1977, reasonable progress has been demonstrated in implementing previously programmed projects.

APPENDIX

ADVISORY INFORMATION ON THE URBAN MASS TRANSPORTATION ADMINISTRATION'S REQUIREMENTS ON PROGRAMMING FOR ELDERLY AND HANDICAPPED PERSONS UNDER 49 CFR 613.204

Pursuant to the planning requirements established for urbanized areas in title 23 and the Urban Mass Transportation Act of 1964, as amended, the Urban Mass Transportation Administration (UMTA) and the Federal Highway Administration (FHWA) have previously jointly issued regulations (23 CFR Part 450 and 49 CFR Part 613) that require the urban transportation planning process to include special efforts to plan public mass transportation facilities and services that can effectively be utilized by elderly and handicapped persons. They have also issued a supplementary statement which provides advisory information on the special efforts planning requirements (appendix to 23 CFR Part 450, Subpart A, published in this edition of the FEDERAL REGISTER). The Urban Mass Transportation Administration has also issued a regulation (49 CFR 613.204) which requires special efforts in the programming of projects. The purpose of this statement is to provide advisory information on that programming regulation.

As a result of special efforts in planning, projects designed to benefit elderly and handicapped persons, including projects designed specifically to benefit wheelchair users and those with semiambulatory capabilities, should appear in the annual element of transportation improvement programs submitted to UMTA after September 30, 1976. The term "projects" is meant to include significant features of larger projects (e.g., level-change mechanisms on full-size buses), as well as specially designed services and improvements in the coordination of existing services and resources. "Projects" includes payment of current operating costs of previously purchased wheelchair-accessible equipment and includes payment of expenses associated with indirect methods of providing service, such as subsidies to reduce taxi fares for wheelchair users or trip coupons provided directly to wheelchair users.

Projects funded by UMTA under section 16(b) (2) may be identified as deriving from local special efforts to meet the needs of wheelchair users and semiambulatory persons only to the extent that the following four conditions are met: (1) the service and vehicles serve wheelchair users and semiambulatory persons; (2) the service meets a priority need identified in this planning process; (3) the service is not restricted to a particularized organizational or institutional clientele; and (4) any fares charged are comparable to those which are charged on standard transit buses for trips of similar length.

The coordination of existing transportation available for wheelchair users and semiambulatory persons, and funds which support the provision or purchase of such transportation, provided by the transit operators, gov-

ernmental health and welfare agencies, and private nonprofit organizations may be identified as a project deriving from local special efforts. If the service and resources thus coordinated meet the four conditions for eligible section 16(b) (2) services (see above) and appear in the transportation improvement program, then those services and resources themselves may be identified as deriving from local special efforts.

Transportation improvement programs submitted to UMTA should identify those projects that result from the wheelchair user aspect of the elderly and handicapped special efforts requirement. Compliance with the fixed facilities section of the UMTA elderly and handicapped regulations (49 CFR 609.13) should not be identified as deriving from local special efforts. On the other hand, efforts which go beyond what the fixed facilities section requires (e.g., making an existing subway station wheelchair accessible when the fixed facility regulation does not so require) may be part of the local special effort.

UMTA will not specify a program design to meet the "special efforts" requirement. However, the following examples are illustrative of a level of effort that will be deemed to satisfy this requirement with respect to wheelchair users and semiambulatory persons:

1. A program for wheelchair users and semiambulatory handicapped persons that will involve the expenditure of an average annual dollar amount equivalent to a minimum of five percent of the section 5 apportionment to the urbanized area. These "five percent funds" may be derived from sources other than section 5. The term "average" permits lower expenditure years to be balanced by higher expenditure years but does not permit an initial delay in implementing projects. The term "section 5 apportionment" refers to UMTA's formula apportionment for areas with a population of 200,000 or more and to the Governor's apportionment for areas with a population under 200,000. Projects that qualify as local "special efforts" for wheelchair users and other semiambulatory persons under the initial paragraphs of this advisory information would be counted in computing the five percent.

2. Purchase of only wheelchair-accessible new fixed route equipment until one-half of the fleet is accessible, or, in the alternative, provision of a substitute service that would provide comparable coverage and service levels.

3. A system, of any design, that would assure that every wheelchair user or semiambulatory person in the urbanized area would have public transportation available if requested for 10 round-trips per week at fares comparable to those which are charged on standard transit buses for trips of similar length, within the service area of the public transportation authority. The system could, for example, provide trip coupons to individuals who would then purchase the needed service.

These examples are illustrative of a level of effort that will satisfy the "special efforts" requirement. They are not regulatory standards or minimums, neither do they exhaust all valid approaches. They are meant to guide the development of local public transportation opportunities for wheelchair users and semiambulatory persons that in fact meet a significant fraction of the identified need within a reasonable time.

[FR Doc. 76-12670 Filed 4-29-76; 8:45 am]

RULES AND REGULATIONS

Title 23—Highways
CHAPTER I—FEDERAL HIGHWAY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 450—PLANNING ASSISTANCE AND STANDARDS

Urban Transportation Planning for Elderly and Handicapped Persons

The purpose of this document is to add a new section to the appendix to 23 CFR Part 450, Subpart A. This new section provides advisory information on urban transportation planning for elderly and handicapped persons. (Other material on transportation for elderly and handicapped persons, issued by the Urban Mass Transportation Administration (UMTA), is being published today at 41 FR 18234 and 41 FR 18236.)

On February 26, 1975, UMTA published proposed regulations regarding transportation for elderly and handicapped persons in the *FEDERAL REGISTER* (40 FR 8314). The proposed regulations included a planning section on which UMTA received extensive comments. Generally, there was concern over the level of detail that seemed to be implied. Many of the comments from the planning community expressed the fear that the cost of carrying out the planning regulations would exceed the UMTA resources available to support such activity. Several comments from the handicapped community expressed the concern that carrying out a highly detailed planning process might have the effect of delaying the institution of service.

Many comments received both at the public hearings and on the docket indicated that elderly consumer organizations are principally concerned with general improvements in public transportation service and with minor equipment modifications that will make use of standard transit equipment easier for persons with physical impairments associated with aging. UMTA's own human factors evaluation carried on in connection with the TRANSBUS project supports this view. For the next generation of buses, expected to be deliverable within the next one to two years, UMTA is mandating, in regulations being issued today amending 49 CFR Chapter VI, step risers that do not exceed eight inches (approximately the architectural standard used in buildings). In addition, those regulations will mandate a variety of other vehicle features designed to make transit more accessible to ambulatory elderly and handicapped persons.

The planning requirements themselves have been recast in the form of a joint UMTA/FHWA issuance providing advisory information on the scope and objectives of the elderly and handicapped requirement of the joint planning regulations, and a program implementation regulation that states additional criteria for the Urban Mass Transportation Administrator's approvals under 23 CFR 450.320. Section 450.120 of the joint planning regulations requires that the planning process "include special efforts to plan public mass transportation facilities and services that can effectively be utilized by elderly and handicapped persons pursuant to section 16 of the UMT Act (49 U.S.C. 1612) and section 165(b) of the Federal-Aid Highway Act of 1973, as amended." This format is somewhat similar to the Transportation System Management requirements imposed on UMTA projects.

While special efforts are due on behalf of all ambulatory elderly and handicapped persons, service for wheelchair users and semiambulatory persons is the area requiring the most specific guidance. The dominant locus of the planning guidance, therefore, is on service to wheelchair users and the semiambulatory handicapped (persons who cannot negotiate steps or who can do so only with difficulty).

The supplemental statement to the FHWA/UMTA joint planning regulations makes it clear that primary emphasis in the planning process is to be placed on techniques of self-identification, i.e., asking the handicapped to identify themselves and report their transportation needs to the planning body, as opposed to elaborate search techniques. It is expected that the applicants in cooperation with the MPO will produce projects susceptible of early implementation.

The planning guidance further instructs the planning process to pay particular attention to the service needs of concentrations of the elderly, and notes that the service provided to such areas must be shown by the applicant in UMTA grant applications.

Another change from the planning section of the proposed UMTA elderly and handicapped regulations is that a presumption is now stated in the planning guidelines that the participation of elderly and handicapped consumers in the planning and programming process is needed for effective project development.

Criteria in this area by which the Urban Mass Transportation Administrator will make project approvals pursuant to 23 CFR 450.320 are stated in 49 CFR 613.204, which is published in this edition of the *FEDERAL REGISTER*.

In consideration of the foregoing and under the authority of section 16 of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1612), section 165 (b) of the Federal-Aid Highway Act of 1973, as amended (23 U.S.C. 142 nt.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and delegations of authority by the Secretary of Transportation at 49 CFR 1.48 and 1.51, the following advisory information is added to the appendix to 23 CFR Part 450, Subpart A.

Effective date: This advisory information is effective upon issuance.

Issued on April 27, 1976.

ROBERT E. PATRICELLI,
 Urban Mass Transportation
 Administrator.

NORBERT T. TIEMANN,
 Federal Highway Administrator.

The following material is added to the appendix to 23 CFR Part 450, Subpart A:

APPENDIX

ADVISORY INFORMATION ON PLANNING FOR ELDERLY AND HANDICAPPED PERSONS UNDER UMTA AND FHWA JOINT REGULATIONS, 23 CFR 450, SUBPARTS A AND C, AND 49 CFR 613, SUBPARTS A AND B.

1. **Background.** Section 16(a) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1612), declares the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; directs that special efforts be made in the planning and design of mass transportation facilities and services so that the availability of mass transportation which elderly and handicapped persons can effectively utilize will be assured; and directs that all federal programs offering assistance in the field of mass transportation contain provisions implementing this policy. Section 165(b) of the Federal-Aid Highway Act of 1973, as amended, contains a similar provision applicable to title 23 mass transportation assistance.

Pursuant to the planning requirements established for urbanized areas in title 23 and the Urban Mass Transportation Act of 1964, as amended, UMTA and FHWA have jointly issued regulations (23 CFR Part 450 and 49 CFR Part 613) that require the urban transportation planning process to include special efforts to plan public mass transportation facilities and services that can effectively be utilized by elderly and handicapped persons. The purpose of this supplementary statement is to provide additional guidance on the special efforts requirement.

2. **General.** Elderly persons and the ambulatory handicapped constitute a significant fraction of present transit ridership. General improvement to transit service can thus be expected to improve conditions for these groups. UMTA's equipment design requirements are meant to ensure that transit equipment is made comfortable and attractive for these users.

Particular care should be directed toward serving the travel needs generated by concentrations of the elderly. The service provided to areas with a high proportion of elderly residents is required to be shown in applications to UMTA for capital or operating assistance.

The focus of this guidance is on service to persons who, because of age or disability, are unable to utilize present transit service and facilities effectively, particularly those who use wheelchairs or other mobility aids which are not accommodated by current bus design. In many communities, persons who use wheelchairs or who otherwise have considerable difficulty negotiating steps find public transportation impossible to use for physical reasons, and private transportation-for-hire (e.g., special taxicab service, medicab, etc.) prohibitively expensive. Specific planning for this group is central to meeting the special efforts requirement.

3. **Consumer representation.** Section 450.120 of the joint planning regulations requires that the planning process include provisions to ensure involvement of the public. Elderly and handicapped persons, including wheelchair users and semiambulatory persons, are a part of the public and should be appropriately involved in the planning process to meet the special efforts requirement. The MPO must describe in what ways such persons, including wheelchair users and semiambulatory persons, were involved in the planning and programming process. Further, it is presumed to be unlikely that effective project development to meet the needs of these users can occur without the assistance and cooperation of such persons, including

wheelchair users and semiambulatory persons, and of public and private health and welfare agencies and handicapped consumer groups.

4. *Special efforts, urban transportation planning process.* The urban transportation planning process must include special efforts to plan public mass transportation facilities and service that can effectively be utilized by elderly and handicapped persons. As used in this guidance, the term "special efforts" refers both to service for elderly and handicapped persons in general and specifically to service for wheelchair users and semiambulatory persons. With regard to transportation for wheelchair users and others who cannot negotiate steps, "special efforts" in planning means genuine, good-faith progress in planning service for wheelchair users and semiambulatory handicapped persons that is reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period. Particular attention should be given to those handicapped persons who are employed or for whom the lack of adequate transportation constitutes the major barrier to employment or job training.

In order to fulfill the special efforts requirement in planning it will be necessary to identify the location and transportation needs of wheelchair users and semiambulatory handicapped persons within the urbanized area. To the extent possible this information should be derived from existing and secondary sources. Primary consideration should be given to self-identification techniques, i.e., asking the handicapped to identify themselves and report their transportation needs to the planning body, as opposed to elaborate search techniques.

In carrying out planning for wheelchair users and semiambulatory persons, a range of alternative service improvements should be evaluated as to coverage, cost, and benefit. Maximum feasible opportunity should be given to private carriers, whether or not they are presently providing mass transportation services, to provide some or all of the services selected.

Considerable short-term benefit can be derived from the coordination and rationalization of existing resources and services to meet the needs of the elderly and handicapped, including wheelchair users and semiambulatory handicapped persons. Governmental health and welfare agencies and private nonprofit organizations spend substantial sums each year to provide or purchase transportation for their clients, and these resources as well as any reduced fare local taxi service should be considered for inclusion in a local coordinated plan.

Finally, the planning process should produce a discussion of the process under which the alternatives were evaluated and the rationale for selection of the service improvement or improvements.

[FR Doc. 76-12678 Filed 4-29-76; 8:45 am]

Title 49—Transportation

CHAPTER VI—URBAN MASS TRANSPORTATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

[Docket No. 74-03]

PART 609—TRANSPORTATION FOR ELDERLY AND HANDICAPPED PERSONS

Transportation for Elderly and Handicapped Persons

On February 26, 1975, the Urban Mass Transportation Administration published proposed regulations regarding trans-

portation for elderly and handicapped persons in the *FEDERAL REGISTER* (40 FR 8314). These proposed regulations codified existing requirements and established new requirements.

Interested persons were invited to submit written comments on the proposed regulations, and 324 such comments were received. In addition, hearings on the proposed regulations were held in April 1975 in Los Angeles, Denver, Chicago, St. Petersburg, Boston, and Washington. A great deal of thoughtful although sometimes conflicting advice was received, and the proposed regulations have in many cases been revised to reflect that advice.

The regulations being issued today are final regulations. However, we will be reviewing how well they work in practice, and we welcome comments on these regulations as well as the companion planning and programing material. Comments should be addressed to the Administrator, Urban Mass Transportation Administration, Department of Transportation, Washington, D.C. 20590.

One intention of the final regulations is to make regular transit service more accessible to the large number of ambulatory elderly and handicapped persons. This goal is widely supported by the individuals and organizations that commented, in writing or in person, on the proposed regulations.

In addition to the above goal, the final elderly and handicapped regulations and the companion planning and programing guidance have the goal of increasing significantly the level of service for wheelchair users and other persons who cannot negotiate steps. In this area, the comments on the proposed regulations revealed substantial disagreement over the best type of service for wheelchair users—accessible fixed route service, with or without accessible feeder service, demand-responsive van or small-bus service, subscription service, subsidized shared-ride taxi service, or some combination of these or other services. Given present knowledge, we cannot say that one of these services or even one combination is best for all communities. In fact, it is likely that site-specific planning and tailoring of appropriate services will always be necessary. We say this with full appreciation of the psychological and rehabilitation advantages of integrating wheelchair users into regular as opposed to specialized transit service.

While UMTA considers that particular approaches must be determined locally (with significant participation by local wheelchair users), we also feel that concrete examples of appropriate levels of effort are helpful. Accordingly, the companion planning and programing documents to these regulations contain supplementary guidance on the planning and programing which must be accomplished in order to continue receiving UMTA assistance. By way of example the guidance includes specific quantitative measures of satisfactory local efforts to serve wheelchair users.

One of the examples in that guidance involves equipping new buses with level

change mechanisms to permit access by wheelchair users. Through our Transbus program, important research and demonstrations on wheelchair access to full-size buses have already been conducted, and we are making available additional research and development funds to American transit bus manufacturers to develop the wheelchair accessibility package for their respective buses. Although no manufacturer of full-size transit buses presently offers a lift or ramp option for its buses, the new bus designs that are about to come on the market could offer that technology.

At least one major transit operator wants to buy wheelchair-accessible buses, and UMTA feels that it is important that competition among manufacturers not be influenced by the presence or absence of a wheelchair option in different buses. Accordingly, for these new bus designs, PMTA will insist that manufacturers offer as an option a wheelchair accessibility package consisting of a level-change mechanism, sufficient front or rear door and passageway clearances to permit the wheelchair to reach a securement location in the bus, and at least one wheelchair securement device.

Although the wheelchair accessibility option requirement is settled, the issue of whether UMTA should mandate a low-floor bus is not settled. The floors of current transit buses are approximately 34 inches above street level. After testing prototypes, the Transbus program produced a specification calling for a 22-inch floor. However, substantial questions have arisen about the costs and benefits of a mandated 22-inch floor height requirement. One bus manufacturer wants to discuss the possibility of a 29-inch floor, with a kneeling device to lower the floor five additional inches. In order to receive advice on the floor-height issue, and on the question of when to make the wheelchair accessibility option and the 8-inch architectural steps requirements effective, UMTA will hold a public hearing on May 5, 1976, and accept written comments submitted before May 14, 1976. UMTA intends to issue a decision on the above issues within 30 days after the time period for submitting comments has elapsed. These matters are difficult, and we would like to receive a full presentation by the interested parties before a decision is made.

Details on the time and place of the hearing, the precise issues to be discussed, the availability of background documents, and advance registration were published at 41 *Federal Register* 15735, April 14, 1976. A copy of the notice is available by writing the Director, Office of Public Affairs, the Urban Mass Transportation Administration, Department of Transportation, Washington, D.C. 20590, or by calling that office at (202) 426-4043.

In the context of the above presentation of our general policies, specific provisions of the final regulations can be addressed. The following comments concern particularly changes from the proposed regulations and the public comments on the proposed regulations.

Definitions. UMTA received many thoughtful public comments on the definition of "handicapped persons" as it appeared in the proposed regulation. Some commentators thought that we should adopt subclassifications of handicapped people in order to specify the service to be provided to each classification; others thought that the definition should conform to the usage of other agencies concerned with the disabled. The definition is, however, drawn directly from section 165(b) of the Federal-Aid Highway Act of 1973, as amended (23 U.S.C. 142 nt.) and section 16(d) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1612(d)). We see no basis on which to tamper with the statutory definition. On the other hand, it is clear that the focus of section 16 is on providing service to those elderly and handicapped persons who cannot now effectively utilize mass transportation, so we have joined the definitions of "elderly" and "handicapped" into a single category of persons who, because of age or disability, are unable without special facilities or special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected.

The definitions of "level-entry" and "step-entry" vehicles have been deleted since the final regulation speaks in terms of the conventional categories of buses, rapid rail vehicles, and light rail vehicles.

Applicability. The regulations are applicable to nonhighway mass transportation capital, operating, and planning assistance projects approved on or after May 31, 1976, under the Urban Mass Transportation Act of 1964, as amended, or title 23, United States Code (highways). These constitute the vast majority of federally-funded mass transportation projects.

Some comments suggested expanding this coverage to research, development, and demonstration projects and to facilities and equipment in projects that have been approved but which have not yet resulted in contracts for procurement of equipment or construction of facilities.

We believe that fixed standards based on the state of the art are inappropriate for research and development projects, which are frequently undertaken in order to advance the state of the art and to which the general public will not have access. However, UMTA does sponsor some research and demonstration projects that are intended to bring new technology and techniques to regular revenue transit service. We will evaluate such projects on a case-by-case basis with a view toward applying these regulations where such application is consistent with the purpose of the project.

We agree with the commentators who suggested that those equipment and facility standards that are within the state of the art should become effective as rapidly as possible after publication of the rule. Therefore, except where UMTA has already concurred in specifications,

both the equipment and facility design standards will become effective with the first procurements carried out under UMTA-assisted projects on or after May 31, 1976. Even before issuance of this regulation it has been UMTA policy not to concur in specifications for new rail rapid transit facilities unless the facilities are accessible to wheelchair users.

The applicability section has been revised to make it clear that only title 23 projects requiring the approval of the Urban Mass Transportation Administrator are covered by these regulations.

Planning. The planning process for urbanized areas is subject to joint UMTA-Federal Highway Administration regulations (23 CFR Part 450, 49 CFR Part 613). UMTA's policies on planning and programming for elderly and handicapped persons are expressed in material being published simultaneously with the elderly and handicapped regulations. That material consists of joint UMTA-FHWA advisory information on planning for elderly and handicapped persons, a new regulation on additional criteria for project approvals by the Urban Mass Transportation Administrator under 23 CFR 450.320(a)(3), and advisory information on the latter programming regulation.

Fixed facilities. A number of commentators took issue with paragraphs 609.15 (a) through (c) of the draft regulations; however, the language of the proposed rules followed the language of the General Services Administration implementing P.L. 90-480, and we have continued to follow that language in the final regulation. The paragraphs have been renumbered in the final rule. Paragraph (b) in the final regulation includes the special requirements that UMTA has imposed on rail facilities because the ANSI standards are not tailored to transportation facilities. We have augmented these requirements in the final rule in response to comments received.

Section 609.13(b)(1) is a new provision which directs that careful attention be given to the location and number of elevators or other vertical circulation devices in designing new underground or elevated transit stations in order to minimize the extra distance which wheelchair users and other persons who cannot negotiate steps may have to travel compared to nonhandicapped persons. Because of the variety of possible station designs, we are unprepared to specify a definite extra distance beyond which the wheelchair user must not be made to travel.

Although paragraph 609.13(b)(2) is slightly revised from the proposed version, this paragraph continues to require that the fare collection system have a clear opening sufficient for wheelchair users. New words make coverage of the fare vending system clear.

Paragraph 609.13(b)(3) is unchanged except that the specific maximum gap between boarding platform and vehicle in the proposed rule has been replaced with a more general requirement. The very narrow gap allowed by the proposed

regulations proved too narrow within current technology to allow for safe movement of trains within the station area. Our research and development office is looking into this matter of the gap, which at present is 3 to 4 inches on the most advanced systems being built.

The proposed requirement for automobile stopping areas for handicapped persons has been deleted because the ANSI standards provide reserved parking places for handicapped persons. The benefit associated with the UMTA requirement appeared marginal.

The proposed requirement for station information systems has been deleted because of the variety of station configurations and possible methods of conveying information. Nevertheless, station builders are encouraged to give particular attention to the information needs of blind persons and deaf persons. Many very fine comments that we received on passenger information systems are properly addressed in the context of an aggressive marketing program and will be pursued in UMTA's transit management program.

Many comments concerned the applicability of the regulations to the renovation of existing facilities. The regulations cover renovations, but careful attention should be paid to section 609.13 (c)(2), which describes the scope of renovation coverage. More than one comment expressed concern that a renovation like repainting would require that an elevator be added to an old station. Clearly the regulations contain no such requirement.

Vehicles. The proposed rules set out a series of specific hardware and design requirements that were included primarily to promote discussion about their feasibility and reliability. In the preamble to the proposed rules, we recognized that some of the equipment was not yet available commercially, and we wanted to solicit comment on "appropriate effective dates" for some hardware requirements "in view of the product development process that would be required."

We received voluminous comments on the proposed vehicle features from manufacturers, transit operators, elderly and handicapped users, governmental agencies, providers of service and other interested parties. In the proposed rules we had deliberately suggested vehicle modifications that we understood to be beyond the state of the art, or that we thought might be beneficial to elderly and handicapped users without knowing their effect on other users and on operations. The comments that we received were thoughtful and helpful. Many comments suggested further bus design features that would unquestionably improve passenger comfort for a wide range of individuals, but the cumulative inclusion of which would excessively increase the price of buses. The final rule has therefore sought to focus on those features of bus design that are more than marginally important to the ability of elderly and handicapped persons to utilize the equipment effectively.

Similarly, since most of these rules are to be effective immediately with re-

spect to the current generation of buses, we generally decided against the inclusion in the final rule of design requirements that require extensive redesign or engineering modifications that would result in large cost increases or delays in availability.

The organization of the vehicle requirements has been changed to reflect standard mass transit terminology rather than the "level-entry" and "step-entry" categories used in the proposed rule. The categories now are: bus, rapid rail, light rail, and "other vehicles." The "rapid rail" category does not include commuter rail vehicles. Commuter rail operations occupy a unique and financially precarious position in urban transportation, and are entering a particularly difficult period of transition as a result of the restructuring of the railroads in the Northeast and Midwest. The future of these systems is unsure and few new rail cars are being built solely for commuter rail service. Therefore, any new commuter rail vehicles will be included in the "other vehicles" category, and requirements will be determined on a case-by-case basis. Because of the great variety of equipment in the small bus (22 feet and shorter) and van category, such vehicles will also be included in the "other vehicles" section.

(1) *Applicability of vehicle requirements.* Several comments on the proposed regulations expressed confusion over the effective date of the vehicle requirements. The effective date provisions have been rewritten to indicate clearly that the vehicle requirements apply to all vehicles for which an UMTA grantee issues, on or after May 31, 1976, a formal procurement solicitation containing vehicle specifications approved by UMTA.

(2) *Wheelchair accessibility option.* As discussed earlier, the regulations include a requirement that manufacturers of new design transit buses offer a wheelchair accessibility option. The latter option consists of a level-change mechanism (e.g., lift or ramp), sufficient clearances to permit a wheelchair user to reach a securement location, and at least one wheelchair securement device. UMTA intends to determine the effective date for this requirement after the May 5, 1976, hearing described above. The option requirement is not meant to require retrofitting of existing buses or retooling of production machinery which will be used to continue to produce existing bus designs.

(3) *Doorways and steps.* The proposed rule suggested interlock systems at both front and rear doors of buses. Many comments objected to the proposed front door interlock system for buses because such a system would prevent the present useful practice of opening the door as the bus comes to a stop. Because that argument has merit and because the bus driver can easily see the front door area, we have deleted the front door interlock requirement. We have also deleted the rear door interlock requirement because we find that requirement only marginally related to making vehicles more accessible to elderly and handicapped persons.

The proposed rule would have required devices that prevent closure on any person or object in the doorway (sensitive-edge or elevator-type doors). Many comments objected to this requirement for buses on the grounds that such doors are unnecessary, expensive, and subject to frequent breakdowns. Because of the merit in these arguments and because we ultimately decided that sensitive-edge doors make only a marginal contribution to utilization of the vehicle by elderly and handicapped persons, we have deleted any suggestion that the regulations require sensitive-edge doors for buses.

Door control mechanism requirements for rail vehicles have been deleted entirely in deference to the research directly on this issue currently being conducted by the Federal Railroad Administration. The results of this research may form the basis for an amendment to the regulations.

The proposed regulations called for a redesign of the stepwell of the current bus so that, with the addition of a retractable step, the maximum height of each step from street level to vehicle floor level would be uniform and no more than eight inches. We invited comment on an appropriate effective date for this requirement in view of the product development that would be required.

The comments were not encouraging. The retractable step at the front of the bus would interfere with ground clearance and was thought to be unreliable in bad weather. Moreover, information developed in the Transbus program indicated that transit buses will pull up to curbs roughly 80 percent of the time, and the average curb is six inches, reducing the need for the retractable step. While there are vastly different operating circumstances in various cities, any national rule should be geared to the typical situation, and we have thus receded from our requirement of a retractable step.

Eight-inch risers proved equally discouraging on the current coach. The distance from the floor of the bus to the lowest step is currently between 19 and 21 inches, which necessitates two steps. Although three rather than two steps could be designed within this height, the stairwell would have to be extended another 11 inches toward the driver in order to accommodate the tread of the extra step. Such an additional intrusion would increase the already-substantial hazard created by the long, narrow stairwell of current design, and would reduce safe standing space within the vestibule. We have been forced to conclude that the provision of eight-inch risers inside the current bus is inconsistent with other safety features that are of equal importance to the elderly and the handicapped (transit safety statistics indicate that the typical accident occurs in the front of the bus to a female passenger over age 50).

Therefore, the final regulations do not include the proposed step height requirements for current generation buses. However, we feel that substantial improvements in the front stepwell can be

made on the next generation of buses, and we have required that those buses have front step risers which do not exceed 8 inches in height—approximately the same accessibility standards as are applied to buildings. We have yet to determine the proper effective date for the requirement, and, therefore, section 609.15(c) of the regulation leaves open the effective date, subject to resolution after the public hearing described earlier.

The door width requirement for rail cars has been changed to 32 inches, which is the standard for barrier-free buildings. The rail door width requirement has also been changed to apply only to side doors. We learned that since rail car doors are built with vertical collision posts next to the end doors, increasing the width between these points could decrease a car's ability to withstand a collision.

The warning signal requirement for level-entry vehicle doors has been retained for rapid rail and light rail vehicles, but the regulations require only an audible signal. Such a signal will aid visually impaired persons.

For level-entry rail systems, the specific maximum gap between vehicle and boarding platform has been replaced with a more general requirement. The very narrow gap allowed by the proposed regulations proved too narrow, given present technology, to allow safe movement of trains within the station area. Our research and development office is looking into this issue.

(4) *Priority seating signs.* The requirement for priority seating signs for elderly and handicapped passengers was one of the more controversial parts of the original proposed regulations. Many comments, both from elderly and handicapped groups and from transit operators, argued that priority seating constituted a form of segregation that detracted from the dignity of elderly and handicapped passengers. On the other hand, several comments stated that priority seating was a good concept and that elderly and handicapped patrons should be given priority on any seat in the vehicle.

We feel that priority seating serves a useful purpose by promoting the safety of elderly and handicapped persons. The act of claiming a priority seat is voluntary, and a person entitled to do so is also free to sit anywhere else on the vehicle. We have improved the phrasing of the requirement in order to allow signs which encourage but do not require the yielding of priority seats to elderly and handicapped persons. The regulation is not intended to prohibit more strongly worded signs.

(5) *Interior handrails and stanchions.* Because of vandalism, cleanliness, and maintenance problems, many comments strongly opposed the proposed requirement that all handrails and stanchions be padded. Because we are not certain that the safety benefits of padded handrails and stanchions outweigh these problems, and because some have suggested that such stanchions may actually

be more difficult to grasp, we have deleted the padding requirement. However, we encourage transit operators to consider modest padding on stanchions and handrails at the front of the bus, where a disproportionate number of injuries occur and where the driver's proximity may reduce vandalism.

The requirements for ample stanchions and handrails, particularly in the entrance area, have been significantly strengthened. This revision includes a new requirement for buses and step-entry light rail vehicles that a system of continuous passenger assists be provided which will allow elderly and handicapped persons to make use of such assists throughout the boarding and fare collection process. The key element of this system would be a handrail or stanchion reachable from outside the vehicle to aid elderly and handicapped passengers at the boarding point. It is also required that this system include a "leaning rail" adjacent to the farebox which a passenger can lean against to remain stable while paying the fare. We find that providing such assists in proper locations is very important in making vehicles more accessible to elderly and handicapped persons.

(6) *Floor and step surfaces.* We continue to require slip-resistant floors and step surfaces, and in addition we now require that all step edges have a band of bright contrasting color(s) running the full width of the step. Most present floors and step surfaces meet the slip-resistant requirement, and we have included the requirement primarily to emphasize the importance of slip-resistant surfaces as safety factors for elderly and handicapped persons.

(7) *Lighting.* The proposed regulations' general interior illumination requirement has been deleted because we find that, from a safety viewpoint, buses being manufactured today provide satisfactory general interior illumination.

However, we believe that lighting standards for stepwells and for street surfaces outside vehicle doorways are appropriate, and the final regulations contain such standards. The problem we seek to correct is too little light, and thus our lighting standards are minimums.

(8) *Fare collection.* The fare collection requirement for buses has been rewritten to emphasize that the farebox should be located as far forward in the vestibule of the bus as possible. Because of the number of different fare payment methods in use on existing light rail systems, we have not included any farebox location requirement for light rail vehicles.

(9) *Other proposed requirements.* We have deleted the requirement for a public address system because of our doubts about our ability to require drivers to utilize such systems as well as uncertainty about the wisdom of the requirement, particularly for exterior public address systems. We have also changed the destination and route sign provisions. We received a great number of comments regarding the sign provisions, especially regarding the appropriate size for sign characters. Most of the controversy con-

cerned whether the size requirement should be written in terms of a specific height requirement, as in the proposed regulations, or as a readability, performance standard. While a performance standard appears to be more acceptable because it would allow greater local choice on sign questions as well as allow technological innovation, we do not feel that enough study has been done on the development of a reasonable standard. UMTA may conduct research on this issue, and, if possible, adopt future standards based on such research.

Waiver. Comments on the waiver section fell generally into two distinct groupings. One group feared that the waiver section would negate the positive effect of the regulations and, therefore, wanted the waiver section deleted or severely restricted. Because of possible unforeseen consequences of particular provisions of these new regulations, we have retained the broad waiver capability. However, we intend to make very sparing use of the waiver provision, as indicated by the standard in the regulation which provides that the waiver must be "clearly necessary" and consistent with the intent of the laws authorizing this rule.

The second group of comments argued that the waiver provision was too strict because of the requirement that the waiver request be presented at a public hearing. These comments recommended that the requirement of presentation at a public hearing be made optional at UMTA's discretion since the need for a waiver may not develop until after submission of the project application and after the public hearing. As a result of this second group of comments we have indicated that submission at the hearing is the norm, and that the UMTA Administrator may require a new public hearing for discussion of the waiver request if he finds that it is substantial.

Finally, we have moved the waiver section to a more logical location after the positive requirements, and we have added a new sentence to reflect the need for the Administrator of General Services' approval for any waiver of paragraph 609.13(a).

Accordingly, 49 CFR Chapter VI is amended by adding a new Part 609, to read as set forth below.

Effective date. This part becomes effective on May 31, 1976.

Issued in Washington, D.C., on April 27, 1976.

ROBERT E. PATRICELLI,
Urban Mass Transportation
Administrator.

Sec.	Purpose.
609.3	Definitions.
609.5	Applicability.
609.7	Transportation planning in urbanized areas.
609.9	Transportation planning in non-urbanized areas.
609.11	Applications for capital or operating assistance.
609.13	Fixed facilities.
609.15	Buses.
609.17	Rapid rail vehicles.

Sec.	
609.19	Light rail vehicles.
609.21	Other vehicles.
609.23	Reduced fare.
609.25	Waiver.

AUTHORITY: Secs. 5 and 16, Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1604, 1612); sec. 165(b), Federal-Aid Highway Act of 1973, as amended (23 U.S.C. 142 nt.); sec. 504, Rehabilitation Act of 1973 (29 U.S.C. 794); 49 CFR 1.51.

§ 609.1 Purpose.

The purpose of this part is to establish formally the requirements of the Urban Mass Transportation Administration (UMTA) on transportation for elderly and handicapped persons.

§ 609.3 Definitions.

As used herein:

"Elderly and handicapped persons" means those individuals who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, including those who are nonambulatory wheelchair-bound and those with semi-ambulatory capabilities, are unable without special facilities or special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected.

§ 609.5 Applicability.

(a) This part, which applies to projects approved by the Urban Mass Transportation Administrator on or after May 31, 1976, applies to all planning, capital, and operating assistance projects receiving Federal financial assistance under sections 3, 5, or 9 of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1602, 1604, or 1607a), and nonhighway public mass transportation projects receiving Federal financial assistance under: (1) subsection (a) or (c) of section 142 of title 23, United States Code; and (2) paragraph (4) of subsection (e) of section 103, title 23, United States Code. However, under certain circumstances evident in sections 609.13 through 609.21, the latter sections apply to fixed facilities and vehicles included in projects approved before May 31, 1976. Sections in this part on capital assistance applications, fixed facilities, and vehicles apply expressly to capital assistance projects receiving Federal financial assistance under any of the above statutes.

§ 609.7 Transportation planning in urbanized areas.

General requirements for transportation planning in urbanized areas are found in joint UMTA-Federal Highway Administration regulations (23 CFR Part 450 and 49 CFR Part 613). These regulations require the urban transportation planning process to include special efforts to plan public mass transportation facilities and services that can effectively be utilized by elderly and handicapped persons. UMTA and FHWA have added a supplementary statement on the special efforts requirement as an appendix to the joint planning regulations. Satisfactory special efforts in this area is an express condition (49 CFR 613.204)

for UMTA project approvals required by 23 CFR 450.320, and UMTA has added a supplementary statement on that requirement as an appendix to 49 CFR Part 613.

§ 609.9 Transportation planning in non-urbanized areas.

- Before a capital assistance project can be approved in a nonurbanized area, the local planning process must include special efforts to plan public mass transportation facilities and services that can effectively be utilized by elderly and handicapped persons.

§ 609.11 Applications for capital or operating assistance.

Applications for capital or operating assistance shall include assurance(s) and descriptive material on transportation for elderly and handicapped persons in accordance with current application instructions.

§ 609.13 Fixed facilities.

(a) Except as otherwise provided in paragraph (c) of this section, every fixed facility—including every station, terminal, building or other facility—designed, constructed, or altered on or after May 31, 1976, with UMTA assistance, the intended use for which will require either that such fixed facility be accessible to the public or may result in the employment therein of physically handicapped persons, shall be designed, constructed, or altered in accordance with the minimum standards in the "American Standard Specifications for Making Building and Facilities Accessible to, and Usable by, the Physically Handicapped, Number A117.1—R 1971," approved by the American Standards Association, Inc. (subsequently changed to American National Standards Institute, Inc.) (ANSI).

(b) In addition to the ANSI standards of paragraph (a) of this section, the following standards apply to rail facilities covered by that paragraph:

(1) Travel distance for wheelchair users: In designing new underground or elevated transit stations, careful attention should be given to the location and number of elevators or other vertical circulation devices in order to minimize the extra distance which wheelchair users and other persons who cannot negotiate steps may have to travel compared to nonhandicapped persons.

(2) International accessibility symbol: The international accessibility symbol shall be displayed at wheelchair accessible entrance(s) to buildings that meet the ANSI standards.

(3) Fare vending and collection systems: Transit fare vending and collection systems shall be designed so as not to prevent effective utilization of the transportation system by elderly and handicapped persons. Each station shall include a fare control area with at least one entrance with a clear opening at least 32 inches wide when open.

(4) Boarding platforms: All boarding platform edges bordering a drop-off or other dangerous condition shall be marked with a warning device consisting of a strip of floor material differing

in color and texture from the remaining floor surface. The design of boarding platforms for level-entry vehicles shall be coordinated with the vehicle design in order to minimize the gap between platform and vehicle doorway and to permit safe passage by wheelchair users and other elderly and handicapped persons.

(c) The standards established in paragraphs (a) and (b) of this section do not apply to:

(1) The design, construction, or alteration of any portion of a fixed facility which need not, because of its intended use, be made accessible to, or usable by, the public or by physically handicapped persons;

(2) The alteration of an existing fixed facility to the extent that the alteration does not involve the installation of, or work on, existing stairs, doors, elevators, toilets, entrances, drinking fountains, floors, telephone locations, curbs, parking areas, or any other facilities susceptible of installation or improvements to accommodate the physically handicapped (the standards do not apply to the unaltered portions or items of an existing fixed facility);

(3) The alteration of an existing fixed facility, or of such portions thereof, to which application of the standards is not structurally possible; and

(4) The construction or alteration of a fixed facility for which a grantee has, prior to May 31, 1976, issued a formal invitation for bids to perform such construction or alteration.

(d) The final project application for any project that includes the design, construction, or alteration of a fixed facility subject to paragraph (a) of this section shall contain one of the following: (1) an assurance that the standards of paragraph (a) of this section will be adhered to in the design, construction, or alteration of such facility; (2) a request for a finding that the project is within one of the exceptions set out in paragraph (c) of this section (the specific exception being identified), with appropriate supporting material; or (3) a request pursuant to section 609.25 for waiver of the standards of paragraphs (a) and (b) of this section, with appropriate supporting material.

§ 609.15 Buses.

(a) The requirements of this section apply to all new transit buses with a length exceeding 22 feet for which an UMTA grantee issues, on or after May 31, 1976 (unless otherwise noted), a formal procurement solicitation containing vehicle specifications approved by PMTA.

(b) Wheelchair accessibility option: Effective [date reserved for later completion], UMTA will concur in transit bus bid packages only if the technical specifications provide for a bus design which permits the addition of a wheelchair accessibility option and if the bid documents require an assurance from each bidder that it offers a wheelchair accessibility option for its buses. The term "wheelchair accessibility option" means a level change mechanism (e.g., lift or

ramp), sufficient clearances to permit a wheelchair user to reach a securement location, and at least one wheelchair securement device.

(c) Steps: The following standards are effective with procurement solicitations issued after [date reserved for later completion]: the vertical distance from a standard 6-inch curb to the first front door step shall not exceed 8 inches; the riser height for each front door step after the first step up from the curb or street level shall also not exceed 8 inches; and the tread depth of steps at both front and rear doors shall be no less than 12 inches.

(d) Priority seating signs: In order to maximize the safety of elderly and handicapped persons, each vehicle shall contain clearly legible sign(s) which indicate that seats in the front of the vehicle are priority seats for elderly and handicapped persons, and which encourage other passengers to make such seats available to elderly and handicapped persons who wish to use them.

(e) Interior handrails and stanchions:

(1) Handrails and stanchions shall be provided in the entranceway to the vehicle in a configuration which allows elderly and handicapped persons to grasp such assists from outside the vehicle while starting to board, and to continue using such assists throughout the boarding and fare collection processes. The configuration of the passenger assist system shall include a rail across the front of the interior of the vehicle which shall serve both as an assist and as a barrier to reduce the possibility of passengers sustaining injuries on the fare collection device or windshield in the event of sudden deceleration. The rail shall be located to allow passengers to lean against it for security while paying fares.

(2) Overhead handrail(s) shall be provided which shall be continuous except for a gap at the rear doorway.

(3) Handrails and stanchions shall be sufficient to permit safe on-board circulation, seating and standing assistance, and unboarding by elderly and handicapped persons.

(f) Floor and step surfaces: (1) All floors and steps shall have slip-resistant surfaces.

(2) All step edges shall have a band of bright contrasting color(s) running the full width of the step.

(g) Lighting: (1) Any stepwell immediately adjacent to the driver shall have, when the door is open, at least 2 footcandles of illumination measured on the step tread.

(2) Other stepwells shall have, at all times, at least 2 footcandles of illumination measured on the step tread.

(3) The vehicle doorways shall have outside light(s) which provide at least 1 footcandle of illumination on the street surface for a distance of 3 feet from all points on the bottom step tread edge. Such light(s) shall be located below window level and shielded to protect the eyes of entering and exiting passengers.

(h) Fare collection: The farebox shall be located as far forward as practicable and shall not obstruct paths to the vehicle.

(i) Destination and route signs: Each vehicle shall have illuminated signs on the front and boarding side of the vehicle.

§ 609.17 Rapid rail vehicles.

(a) The requirements of this section apply to all new rapid rail vehicles for which an UMTA grantee issues, on or after May 31, 1976, a formal procurement solicitation containing vehicle specifications approved by UMTA.

(b) Doorways: (1) Passenger doorways on vehicle sides shall have clear openings at least 32 inches wide when open.

(2) The international accessibility symbol shall be displayed on the exterior of each vehicle operating on a wheelchair accessible rapid rail system.

(3) Audible warning signals shall be provided to alert elderly and handicapped persons of closing doors.

(4) Where the vehicle will operate in a wheelchair accessible station, the design of vehicles shall be coordinated with the boarding platform design in order to minimize the gap between the vehicle doorway and the platform and to permit safe passage by wheelchair users and other elderly and handicapped persons.

(c) Priority seating signs: In order to maximize the safety of elderly and handicapped persons, each vehicle shall contain clearly legible sign(s) which indicate that certain seats are priority seats for elderly and handicapped persons, and which encourage other passengers to make such seats available to elderly and handicapped persons who wish to use them.

(d) Interior handrails and stanchions: (1) Handrails and stanchions shall be sufficient to permit safe boarding, on-board circulation, seating and standing assistance, and unboarding by elderly and handicapped persons.

(2) Handrails, stanchions, and seats shall be located so as to allow a wheelchair user to enter the vehicle and position the wheelchair in a location which does not obstruct the movement of other passengers.

(e) Floor surfaces: All floors shall have slip-resistant surfaces.

§ 609.19 Light rail vehicles.

(a) The requirements of this section apply to all new light rail vehicles for which an UMTA grantee issues, on or after May 31, 1976, a formal procurement solicitation containing vehicle specifications approved by UMTA.

(b) Doorways: (1) Passenger doorways on vehicle sides shall have clear

openings at least 32 inches wide when open.

(2) The international accessibility symbol shall be displayed on the exterior of each vehicle operating on a wheelchair accessible light rail system.

(3) Audible warning signals shall be provided to alert elderly and handicapped persons of closing doors.

(4) The design of level-entry vehicles shall be coordinated with the boarding platform design in order to minimize the gap between the vehicle doorway and the platform and to permit safe passage by wheelchair users and other elderly and handicapped persons.

(c) Priority seating signs: In order to maximize the safety of elderly and handicapped persons, each vehicle shall contain clearly legible sign(s) which indicate that certain seats are priority seats for elderly and handicapped persons, and which encourage other passengers to make such seats available to elderly and handicapped persons who wish to use them.

(d) Interior handrails and stanchions: (1) On vehicles which require use of steps in the boarding process, handrails and stanchions shall be provided in the entranceway to the vehicle in a configuration which allows elderly and handicapped persons to grasp such assists from outside the vehicle while starting to board, and to continue using such assists throughout the boarding process.

(2) On level-entry vehicles, handrails, stanchions, and seats shall be located so as to allow a wheelchair user to enter the vehicle and position the wheelchair in a location which does not obstruct the movement of other passengers.

(3) On all vehicles, handrails and stanchions shall be sufficient to permit safe boarding, on-board circulation, seating and standing assistance, and unboarding by elderly and handicapped persons.

(e) Floor and step surfaces: (1) All floors and steps shall have slip-resistant surfaces.

(2) Any step edges shall have a band of bright contrasting color(s) running the full width of the step.

(f) Lighting in step-entry vehicles: (1) Any stepwell immediately adjacent to the driver shall have, when the door is open, at least 2 footcandles of illumination measured on the step tread.

(2) Other stepwells shall have, at all times, at least 2 footcandles of illumination measured on the step tread.

(3) The vehicle doorways shall have outside lights which provide at least 1

footcandle of illumination on the street surface for a distance of 3 feet from all points on the bottom step tread edge. Such lights shall be located below window level and shielded to protect the eyes of entering and exiting passengers.

§ 609.21 Other vehicles.

Requirements for vehicles not covered by sections 609.15, 609.17, or 609.19 will be determined by UMTA on a case-by-case basis as part of the project approval process.

§ 609.23 Reduced fare.

Applicants for financial assistance under section 5 of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1604), must, as a condition to receiving such assistance, give satisfactory assurances, in such manner and form as may be required by the Urban Mass Transportation Administrator and in accordance with such terms and conditions as the Urban Mass Transportation Administrator may prescribe, that the rates charged elderly and handicapped persons during non-peak hours for transportation utilizing or involving the facilities and equipment of the project financed with assistance under this section will not exceed one-half of the rates generally applicable to other persons at peak hours, whether the operation of such facilities and equipment is by the applicant or is by another entity under lease or otherwise.

§ 609.25 Waiver.

The requirements set forth in this part may be modified or waived on a case-by-case basis upon application to the Urban Mass Transportation Administrator if the Administrator determines that such modification or waiver is clearly necessary and is consistent with the intent of the laws cited under "Authority." However, a modification or waiver of paragraph 609.13(a) for a building covered by P.L. 90-480 will also require the approval of the Administrator of General Services. Any request for modification or waiver should be presented for comment at the public hearing required prior to submission of a project application to UMTA. In the event that the waiver is not presented at the hearing, the Urban Mass Transportation Administrator may require a new public hearing if he finds that the requested waiver would have a substantial effect on the accessibility of the facility or equipment to elderly and handicapped persons.

[FR Doc.76-12677 Filed 4-29-76; 8:45 am]

listing a specific course which must be taken.

No other changes to the proposal have been made.

Accordingly, with this change, the proposed amendment is adopted as set forth below.

Effective date. This amendment is effective on November 19, 1976.

Dated: October 12, 1976.

O. W. SILER,
Admiral, U.S. Coast Guard,
Commandant.

Part 10 of Title 46 of the Code of Federal Regulations is amended as follows:

1. By revising § 10.02-5(f) to read:

§ 10.02-5 Requirements for original license.

(f) *First Aid Certificate.* No candidate for original license shall be examined until—

(1) He presents a currently valid certificate of completion of a cardiopulmonary resuscitation course from—

(i) The American National Red Cross;

or

(ii) The American Heart Association;

and

(3) He presents a certificate from—

(i) The United States Public Health Service indicating that he has passed an examination based on the contents of "The Ship's Medicine Chest and First Aid at Sea", or another manual arranged for and approved by the Public Health Service; or

(ii) The American National Red Cross indicating completion of its "Standard First Aid and Personal Safety" course.

2. By revising § 10.13-13(a) to read:

§ 10.13-13 General requirements for original licenses.

(a) *First Aid Certificate.* No candidate for original license shall be qualified until—

(1) He presents a currently valid certificate of completion of a cardiopulmonary resuscitation course from—

(i) The American National Red Cross;

or

(ii) The American Heart Association;

and

(3) He presents a certificate from—

(i) The United States Public Health Service indicating that he has passed an examination based on the contents of "The Ship's Medicine Chest and First Aid at Sea", or another manual arranged for and approved by the Public Health Service; or

(ii) The American National Red Cross indicating completion of its "Standard First Aid and Personal Safety" course.

3. By revising § 10.16-31(b) to read:

§ 10.16-31 Knowledge requirements.

(b) . . .
(1) Hold—

(i) A currently valid certificate of completion of a cardiopulmonary resuscitation course from—

(A) The American National Red Cross;

or

(B) The American Heart Association;

and

(3) A currently valid—

(A) First aid certificate issued by the United States Public Health Service; or

(B) Certificate of completion of the American National Red Cross course: "Standard First Aid and Personal Safety".

(Sec. 1, 86 Stat. 423, as amended (46 U.S.C. 405), 60 Stat. 1097 (46 U.S.C. 234, 234a, 239).)

[FR Doc. 76-30421 Filed 10-15-76; 8:45 am]

Title 45—Transportation

CHAPTER VI—URBAN MASS TRANSPORTATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 609—TRANSPORTATION FOR ELDERLY AND HANDICAPPED PERSONS
Completion of Transit Bus Requirements

On April 30, 1976 the Urban Mass Transportation Administration (UMTA) published final regulations on transportation for elderly and handicapped persons in the Federal Register (41 FR 18234). The general regulations (49 CFR Part 609) contained two paragraphs on buses (§§ 609.15(b) and 609.15(c)) in which the effective date was reserved for later completion. The purpose of this document is to complete and clarify the coverage of those paragraphs and to add a floor height requirement.

On May 5, 1976 the Administrator of UMTA held a day-long public hearing, announced in the Federal Register on April 14, 1976, on the issues covered by this document as well as other related issues. UMTA's decisions on those issues were announced on July 27, 1976 and published in the Federal Register on August 2, 1976 (41 FR 32286). The latter document presents the full background and rationale for those decisions and for this issuance, and is incorporated by reference into this preamble.

The requirements being issued by this document apply only to new, standard, full-size urban transit buses to be used principally in normal local transit service. Such buses are customarily 35- to 40-foot buses with seats for 43 to 51 passengers. Any requirements concerning wheelchair accessibility, floor height, or step height for other buses will be handled on a case-by-case basis as part of the project approval process.

Accordingly, 49 CFR Part 609 is amended by revising § 609.15(a), (b), and (c) to read as set forth below.

Effective date. This revision is effective upon issuance.

Issued in Washington, D.C. on October 12, 1976.

ROBERT E. PATRICELLI,
Urban Mass Transportation
Administrator.

49 CFR 609.15(a), (b), and (c) are revised to read as follows:

§ 609.15 Buses.

(a) Paragraphs (b) and (c) of this section apply only to new standard, full-size urban transit buses to be used principally in normal local transit service for which an UMTA grantee issues, after February 15, 1976, a procurement solicitation containing vehicle specifications approved by UMTA. The remaining paragraphs of this section apply to the above vehicles as well as all new transit buses with a length exceeding 22 feet for which an UMTA grantee issues, on or after May 31, 1976, a procurement solicitation containing vehicle specifications approved by UMTA. Any requirements concerning wheelchair accessibility, floor height, or step height for buses covered by paragraphs (c) through (e) but not (b) and (c) of this section will be handled on a case-by-case basis as part of the project approval process.

(b) *Wheelchair accessibility option:* To the extent specified by paragraph (a) of this section, procurement solicitations shall provide for a bus design which permits the addition of a wheelchair accessibility option and shall require an assurance from each bidder that it offers a wheelchair accessibility option for its buses. The term "wheelchair accessibility option" means a level change mechanism (e.g., lift or ramp), sufficient clearances to permit a wheelchair user to reach a securement location, and at least one wheelchair securement device.

(c) *Floor height and steps:* To the extent specified by paragraph (a) of this section, procurement solicitations shall provide for a design which meets the following requirements:

(1) The floor height at the front door after the vehicle stops shall not exceed 24 inches (a kneeling feature may be used to reduce the floor height to the required level).

(2) The vertical distance from a standard 6-inch curb to the first front door step shall not exceed 8 inches (a kneeling feature may not be used to meet this requirement).

(3) The riser height for each front door step after the first step up from the curb or street level shall not exceed 8 inches.

(4) The tread depth of steps at both front and rear doors shall be no less than 12 inches.

[FR Doc. 76-30421 Filed 10-15-76; 8:45 am]

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

[Rev. S.O. No. 1166, Amdt. 7]

PART 1033—CAR SERVICE

Chicago, Rock Island and Pacific Railroad Co.

At a session of the Interstate Commerce Commission, Railroad Service Board, held in Washington, D.C., on the 8th day of October 1976.

RULES AND REGULATIONS

9655

cent of the cost of the buses. Comments are requested as to the procurement procedures which should be adopted to implement these policies. All interested persons are invited to submit such comments by February 24, 1977. Comments should identify the regulatory docket number (see above), and be marked "Procurement Policy" on the envelope. Four copies (if possible) should be submitted to the Docket Clerk, Office of the General Counsel, TGC-10, ATTN: Docket No. 51, Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590. Comments will be available for inspection and copying in the Office of the Assistant General Counsel for Operations and Legal Counsel (TGC-10), Room 10100, 400 7th Street, S.W., Washington, D.C. from 9:00 a.m. to 5:30 p.m. local time, Monday through Friday except holidays.

Accordingly, 49 CFR Part 600 is amended by revising § 609.15(a) to read as set forth below.

Effective date: This revision is effective on February 14, 1977.

Issued in Washington, D.C. on February 14, 1977.

BROCK ADAMS,
Secretary of Transportation.

49 CFR 609.15(a) is revised to read as follows:

§ 609.15 Buses.

(a) Paragraph (b) of this section applies to new, standard, full-size urban transit buses (of current or advanced design) for which a recipient of UMTA funds issues a procurement solicitation containing UMTA-approved vehicle specifications after February 14, 1977.

Paragraph (c) of this section applies to new, standard full-size urban transit buses (of current or advanced design) for which an UMTA grantee issues a procurement solicitation containing UMTA-approved vehicle specifications after May 27, 1977. The remaining paragraphs of this section apply to these and all other transit buses exceeding 22 feet in length for which an UMTA grantee issues, on or after May 27, 1977, a procurement solicitation containing UMTA-approved vehicle specifications. For any transit bus exceeding 22 feet in length, but not otherwise described above, requirements concerning wheelchair accessibility, floor height, or step height will be handled on a case-by-case basis as part of the project approval process.

[FR Doc.77-5127 Filed 2-15-77; 12:14 pm]

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE, GENERAL
ADMINISTRATIONPART 94—NONDISCRIMINATION ON THE
BASIS OF HANDICAP IN PROGRAMS
AND ACTIVITIES RECEIVING OR BENEFIT-
TING FROM FEDERAL FINANCIAL
ASSISTANCE

AGENCY: Department of Health, Education, and Welfare.

ACTION: Final rule.

SUMMARY: This regulation implements section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706, with regard to federal financial assistance administered by the Department of Health, Education, and Welfare. Section 504 provides that "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." The regulation, which applies to all recipients of federal assistance from HEW, is intended to ensure that their federally assisted programs and activities are operated without discrimination on the basis of handicap. The regulation defines and forbids acts of discrimination against qualified handicapped persons in employment and in the operation of programs and activities receiving federal assistance from the Department. As employers, recipients, and make reasonable accommodation to the handicaps of applicants and employees unless the accommodation would cause the employer undue hardship. As providers of services, recipients are required to make programs operated in existing facilities accessible to handicapped persons, to ensure that new facilities are constructed so as to be readily accessible to handicapped persons, and to operate their programs in a non-discriminatory manner.

EFFECTIVE DATE: June 3, 1977.

FOR FURTHER INFORMATION, CONTACT:

John Wodatch, Director, Office of New Programs, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C. 20201, 202-245-1821.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of the Rehabilitation Act of 1973 (Public Law 93-112) Congress enacted section 504, which provides that "no otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." In the same statute, Congress defined the term "handicapped individual" solely with relationship to employment; section 7(6) of the 1973 Act defined the term "handi-

capped individual" as "any individual who (a) has a physical or mental disability which for such individual constitutes or results in substantial handicap to employment and (b) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services" However, the following year, in section 111(a) of the Rehabilitation Act Amendments of 1974 (Public Law 93-506), Congress amended the definition of "handicapped individual" for purposes of section 504 and the other provisions of titles IV and V of the Rehabilitation Act so that the definition is no longer limited to the dimension of employability. For purposes of section 504 of the Act, a "handicapped individual" is defined as "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." With this amended definition, it became clear that section 504 was intended to forbid discrimination against all handicapped individuals, regardless of their need for or ability to benefit from vocational rehabilitation services.

Section 504 thus represents the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap. The language of section 504 is placed identical to the comparable nondiscrimination provisions in title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 (applying to racial discrimination and to discrimination in education on the basis of sex). It establishes a mandate to end discrimination and to bring handicapped persons into the mainstream of American life. The Secretary intends vigorously to implement and enforce that mandate.

THE PROBLEM OF DISCRIMINATION

From the outset, the Department has recognized that the problem of ending discrimination on the basis of handicap presents considerations that are extremely complex. The diversity of types of handicaps, as well as the wide variety of settings in which programs financed by the Department are offered, make the task of prescribing general rules of non-discriminatory treatment a difficult one.

There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity. Thus, for example, it is meaningless to "admit" a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building. Nor is one providing

equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction.

These problems have been compounded by the fact that ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemption from section 504 or this regulation. Congress' mandate to end discrimination is clear. But it is also clear that factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination and to bring handicapped persons into full participation in federally financed programs and activities.

The very general language of section 504 itself and the scant legislative history surrounding its enactment provide little guidance as to how these complex issues should be resolved. The rulemaking process in which the Department has engaged has, however, provided a basis for an initial resolution of these issues. The Secretary believes the resulting regulation offers genuine promise of providing an effective and workable program for ending discrimination against handicapped persons.

RULEMAKING HISTORY

On May 17, 1976, the Department published a Notice of Intent in the *Federal Register*, seeking public comment on fifteen identified critical issues, 41 FR 20296. A draft proposed rule was attached to the Notice of Intent, as was a statement of the estimated economic and inflationary impact of the draft proposal, prepared in accordance with the requirements of Executive Order 11821.

Over three hundred written comments were received in response to the Notice of Intent. The written comments were supplemented by a series of ten meetings conducted by the Office for Civil Rights at various locations across the country.

On July 16, 1976, the Department published a Notice of Proposed Rulemaking analyzing comments received on the critical issues identified in the Notice of Intent and setting forth a revised proposed regulation for public comment, 41 FR 29548. The initial 60-day comment period was extended in response to numerous requests until October 14, 1976. Additional comments received since that date have also been considered to the extent feasible. A total of more than 700 comments were received in response to the July 16 Notice of Proposed Rulemaking; they have been analyzed along with approximately 150 comments sent in response to May 17 Notice that were received too late to be analyzed during the first comment period. Finally, an additional twenty-two public meetings were held after publication of the July 16 Notice, again designed to inform interested persons and organizations of the proposed regulation and to solicit their comments and recommendations. Transcripts of all these meetings were made and analyzed along with the writ-

ten comments. Copies of these transcripts, as well as the written comments, are available for public inspection in Room 5400, 330 Independence Avenue, S.W., Washington, D.C. 20201.

The Secretary believes that both the written comments and the views expressed at the public meetings have illuminated the complex issues involved in implementing section 504 in an effective and workable fashion. The Secretary's response to the comments of interested parties, and the explanation for changes in the proposed regulation, are set forth in the section-by-section analysis of each subpart of the regulation, which appears as Appendix A to the regulation. As this analysis explains, a number of provisions in the proposed regulation have been eliminated as duplicative or unnecessary; others have been shortened or clarified. The goal throughout has been to design a regulation that preserves the essential elements of a strong and effective program for ending discrimination, while avoiding the imposition of unnecessary or counterproductive administrative obligations on recipients.

OVERVIEW OF REGULATION

The regulation is divided into seven subparts. Subpart A (General Provisions) defines the important terms that are used throughout the regulation and states in general terms the discriminatory acts that are prohibited. It also sets forth what the Secretary believes is a simple, workable system of administration: assurances of compliance, self-evaluation by recipients, establishment of grievance procedures, and notification of employees and beneficiaries of the recipient's policy of nondiscrimination on the basis of handicap. The regulation covers all types of physical and mental impairments, including drug addiction and alcoholism.

Subpart B, dealing with employment practices, bars discrimination by recipients of HEW assistance in recruitment, hiring, compensation, job assignment and classification, and fringe benefits. It also requires employers to make reasonable accommodation to qualified handicapped applicants or employees unless it can be demonstrated that the accommodation would impose an undue hardship on the employer.

Subpart C sets forth the central requirement of the regulation—program accessibility. All new facilities are required to be constructed so as to be readily accessible to and usable by handicapped persons. Every existing facility need not be made physically accessible, but all recipients must ensure that programs conducted in those facilities are made accessible. While flexibility is allowed in choosing methods that in fact make programs in existing facilities accessible, structural changes in such facilities must be undertaken if no other means of assuring program accessibility is available.

Subparts A, B, and C of the regulation, as well as subpart G—which incorporates by reference the Department's

procedures under title VI of the Civil Rights Act of 1964—apply to all recipients of financial assistance from the Department. The remaining subparts of the regulation contain more specific requirements applicable to three major classes of recipients.

Subpart D is concerned with preschool, elementary, and secondary education. Its provisions have been closely coordinated with those of the Education for All Handicapped Children Act of 1975 (Pub. L. 94-142). They require, basically, that recipients operating public education programs provide a free appropriate education to each qualified handicapped child in the most normal setting appropriate. The regulation also sets forth evaluation requirements designed to ensure the proper classification and placement of handicapped children, and due process procedures for resolving disputes over placement of students. While the Department does not intend to review individual placement decisions, it does intend to ensure that testing and evaluation procedures required by the regulation are carried out, and that school systems provide an adequate opportunity for parents to challenge and seek review of these critical decisions. And the Department will place a high priority on pursuing cases in which a pattern or practice of discriminatory placements may be involved.

Subpart E deals with postsecondary education. It proscribes discrimination against handicapped persons in recruitment, admission and treatment after admission. Colleges and universities are required to make reasonable adjustments to permit handicapped persons to fulfill academic requirements, and to ensure that they are not effectively excluded from programs because of the absence of auxiliary aids. Groups of colleges may not establish consortia exclusively for handicapped students.

Finally, Subpart F deals with health, welfare and other social service programs. It forbids discrimination in providing such services and requires larger recipients to provide auxiliary aids to handicapped individuals where necessary. Specific provisions require hospitals not to discriminate against addicts or alcoholics who need medical services and to establish emergency room procedures for communication with persons with impaired hearing. Under Subpart C, health and social service providers may satisfy their program accessibility obligations with respect to existing facilities by arranging to meet beneficiaries in accessible locations. In addition, small providers may refer patients or other beneficiaries to accessible providers as a "last resort" alternative to making significant structural changes.

EXECUTIVE ORDER 11914

Under Executive Order 11914 (41 FR 17871, April 28, 1976), the Department is required to issue general standards for other departments and agencies of the Federal government to follow in promulgating regulations implementing Section 504. This responsibility will be fulfilled

promptly and independently from this regulation. The Department does, however, expect to incorporate the definition of handicapped person adopted in § 84.3 (j) of this regulation in the standards for determining what persons are covered by the Act. The Secretary also anticipates that the relevant provisions of Subparts A, B and C of the regulation will be the basis for guidelines, pursuant to the Executive Order, as to what are discriminatory practices.

ECONOMIC IMPACT

The Department has previously certified, in issuing the Notice of Intent and the Notice of Proposed Rulemaking, that the economic and inflationary impact of the proposed regulation had been carefully evaluated in accordance with OMB Circular A-107. That analysis, which was printed at 41 FR 20312 (May 17, 1976), has been revised and updated, and is available on request.

SECTION-BY-SECTION ANALYSIS OF REGULATION

Appended to the final regulation is a section-by-section analysis of the regulation, which describes the basis and purpose of each section, discusses significant comments, and explains the basis for any changes made from the proposed regulation published in July 1976.

In consideration of the foregoing, Part 84, to read as set forth below, is hereby ordered to be added to Title 45 of the Code of Federal Regulations.

Dated: April 28, 1977.

JOSEPH A. CALIFANO, JR.,
Secretary, Department of
Health, Education, and Welfare.

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APPENDIX A—ANALYSIS OF FINAL REGULATION

AUTHORITY: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94-142, 89 Stat. 796; sec. 321, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 84 Stat. 182 (42 U.S.C. 4591), as amended; sec. 407, Drug Abuse Office and Treatment Act of 1972, 86 Stat. 78 (21 U.S.C. 1174), as amended.

Subpart A—General Provisions

§ 84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health, Education, and Welfare and to each program or activity that receives or benefits from such assistance.

§ 84.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Public Law 93-516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Health, Education, and Welfare.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision,

any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

- (1) Funds;
- (2) Services of Federal personnel; or
- (3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j) (1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a phy-

sical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j) (2) (i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool, elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under § 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 84.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person

by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contract or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons

from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§ 84.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b) (2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Director may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to

forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 84.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Director deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies, and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c) (1) of this section, maintain on file, make available for public inspection, and provide to the Director upon request: (i) a list of the interested persons consulted, (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

RULES AND REGULATIONS

§ 84.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§ 84.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 84.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 84.9 Administrative requirements for small recipients.

The Director may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 84.7 and 84.8, in whole or in part, when the Director finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 84.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices**§ 84.11 Discrimination prohibited.**

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not result, regardless of whether applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of leave, demotion, transfer, lay-off, termination, right of return from lay-off, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 84.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 84.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's

§ 84.52 Health, welfare, and other social services.

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 84.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Director may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 84.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity for persons who are

institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 84.3(k) (2), in its program or activity is provided an appropriate education, as defined in § 84.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under Subpart D.

§§ 84.55-84.60 [Reserved]

Subpart G—Procedures

§ 84.61 Procedures.

NOTE: Incorporation by reference provisions approved by the Director of the Federal Register, May 27, 1975. Incorporated documents are on file at the Office of the Federal Register.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6-80.10 and Part 81 of this Title.

§§ 84.62-84.99 [Reserved]

APPENDIX A—ANALYSIS OF FINAL REGULATION

SUBPART A—GENERAL PROVISIONS

Definitions—1. "Recipient". Section 84.23 contains definitions used throughout the regulation. Most of the comments concerning § 84.3(f), which contains the definition of "recipient," commended the inclusion of recipients whose sole source of federal financial assistance is Medicaid. The Secretary believes that such Medicaid providers should be regarded as recipients under the statute and the regulation and should be held individually responsible for administering services in a nondiscriminatory fashion. Accordingly, § 84.3(f) has not been changed. Small Medicaid providers, however, are exempt from some of the regulation's administrative provisions (those that apply to recipients with fifteen or more employees). And such recipients will be permitted to refer patients to accessible facilities in certain limited circumstances under revised § 84.22(b). The Secretary recognizes the difficulties involved in federal enforcement of this regulation with respect to thousands of individual Medicaid providers. As in the case of title VI of the Civil Rights Act of 1964, the Office for Civil Rights will concentrate its compliance efforts on the state Medicaid agencies and will look primarily to them to ensure compliance by individual providers.

One other comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of § 84.4(b) (iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. "Federal financial assistance". In § 84.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the

explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty in title VI, we think it unlikely that Congress intended section 504 to apply to such contracts.

In its May 1974 Notice of Intent, the Department suggested that the arrangement under which individual practitioners, hospitals, and other facilities receive reimbursement for providing services to beneficiaries under Part B of title XVIII of the Social Security Act (Medicare) constitutes a contract of insurance or guaranty and thus falls within the exemption from the regulation. This explanation oversimplified the Department's view of whether Medicare Part B constitutes Federal financial assistance. The Department's position has consistently been that, whether or not Medicare Part B arrangements involve a contract of insurance or guaranty, no Federal financial assistance flows from the Department to the doctor or other practitioner under the program, since Medicare Part B—like other social security programs—is basically a program of payments to direct beneficiaries.

3. "Handicapped person". Section 84.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j) (1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j) (2) (i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent,

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or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph (j)(2)(iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics.* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on

this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees.

With respect to services, there is evidence that drug addicts and alcoholics are often denied treatment at hospitals for conditions unrelated to their addiction or alcoholism. In addition, some addicts and alcoholics have been denied emergency treatment. These practices have been specifically prohibited by section 407 of the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174) and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended. These statu-

tory provisions are also administered by the Department's Office for Civil Rights and are implemented in § 84.53 of this regulation.

With respect to other services, the implications of coverage of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. *"Qualified handicapped person."* Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 84.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of § 84.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 84.3(k)(2) (formerly § 84.3(k)(3)) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several

commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of § 84.6(a)(3), however, persons beyond the age limits prescribed in § 84.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 84.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which state law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally, 3-18 as of September 1978, and 3-21 as of September 1980 are incorporated by reference in this paragraph.

Section 84.3(k)(3) (formerly § 84.3(k)(2)) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. General prohibitions against discrimination. Section 84.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1)(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that, in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau v. Nichols*, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting ap-

propriate to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to § 84.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§ 84.38 and 84.47 in connection with physical education and athletics programs.

Section 84.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret § 84.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of § 84.23.

7. Assurances of compliance. Section 81.5 (a) requires a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from federal financial assistance from this Department will be conducted in compliance with this regulation. To facilitate the submission of assurances by thousands of Medicaid providers, the Department will follow the title VI procedures of accepting, in lieu of assurances, certification on Medicaid vouchers. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. Private rights of action. Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of government. There is, however, case law holding that such a right exists. *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); see *Hairston v. Drosick*, Civil No. 75-0691 (S.D. W. Va., Jan. 14, 1978); *Gurmarkin v. Castanzo*, 411 F. Supp. 982 (E.D. Pa. 1976); cf. *Lau v. Nichols*, *supra*.

9. Remedial action. Where there has been a finding of discrimination, § 84.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a) (1) include provision of services to persons previously discriminated against, reinstatement of employees, and development of a remedial action plan. Should a recipient fail

to take required remedial action, the ultimate sanctions of court action or termination of federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a)(1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. Voluntary action. In § 84.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. Self-evaluation. Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c) (ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. Grievance procedure. Section 81.7 (formerly § 84.8) requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that

grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of § 84.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 84.8 (formerly § 84.9) sets forth requirements for dissemination of statements of nondiscrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In § 84.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paperwork burdens on them and unduly stretch the enforcement resources of the Department.

Section 84.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of § 84.8 (a) has been revised to list possible, rather than required, means of notification. Section 84.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, § 84.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Former § 84.9(b) (2), which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new § 84.9 the Director may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 84.10 (a) states that compliance with the regulation is not excused by state or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind lawyers may find it more difficult to find jobs than do nonhandicapped lawyers.

SUBPART B—EMPLOYMENT PRACTICES

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972 (45 CFR Part 89) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requires certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive federal procurement contracts in excess of \$2500 and are therefore also subject to section 503.

15. *Discriminatory practices.* Section 84.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a) (3) has been added to clarify the employment obligations of recipients that receive federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congress chose the words "positive steps" instead of "affirmative action" advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of § 84.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of § 84.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirement of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 84.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable

accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 84.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.

The reasonable accommodation standard in § 84.12 is similar to the obligation imposed upon Federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the federal government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the "business necessity" standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, hospitals, colleges and universities, nursing homes, day-care centers, and welfare offices. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to and understandable by recipients of HEW funds.

17. *Tests and selection criteria.* Revised § 84.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria

CERTIFICATE OF SERVICE

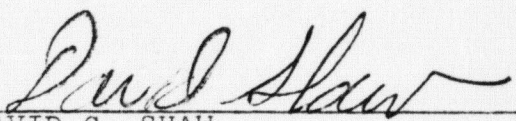
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